Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

WILLIAM J. ZISK AND LOIS E. ZISK
Petitioners

VS.

CITY OF ROSEVILLE; JUNE WANISH; GEORGE A BULJAN; RICHARD ROCCUCCI; THOMAS CHAMBLISS; JOHN M. BYOUK; MEL HAMEL; WILLIAM SANTUCCI; PAULINE ROCCUCCI; HARRY CRABB, JR; MICHAEL F. DEAN; STEVEN BRUCKMAN; G. RICHARD BROWN; FREDERICK L. BARNETT; MARTHA RILEY,
Respondent(s)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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In Propria Persona

February 10, 1999

48pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court ought to issue an order granting certiorari, vacating the judgment below without determination of the merits and remanding to entry of default judgment for the relief demanded in petitioners' verified amended complaint, where (a) intervening factors have arisen that have a legal bearing on the decision, (b) clarification of the opinion below is needed to assure the jurisdiction of the Court of Appeal, (c) clarification of the factor the judgment below was in error, (d) clarification of the factor that entry of default judgment on the merits for the relief demanded in petitioners' complaint is appropriately in order.

2. Whether petitioners have been deprived of a constitutionally protectible property interest for an improper motive and by means that were pretexual, arbitrary and capricious and without any rational basis and without substantive procedural due process and just compensation.

3. Whether District Court Chief Judge William A. Shubb, with daughter employed as attorney in respondent counsels' law firm, violated the mandates of Title 28 U.S.C.A. § 455(a) (b)(1)(5)(ii)(iii) and exceeded jurisdiction with summary dismissal of petitioners' verified amended civil complaint prior to his recusal.

4. Whether District Court refusal to enter default for failure to plead or otherwise respond to petitioners' complaint within required time period denied petitioners equal treatment and due process requirement of opportunity to be heard.

5. Whether non-compliance of the mandates of Federal Rules of Civil Procedures Rule 58 and Rule 79(b) starts the time to run for notice of appeal.

6. Whether respondent former city attorney has deprived petitioners impartial procedural due process, equal treatment and just compensation while acting in triple capacity - first as respondent city attorney in denial of petitioners qualified application for a building permit - secondly, as state superior court judge presiding over respondents abusive eminent domain proceedings - thirdly, as justice of state court of appeals deciding related actions.

7. Whether lower state court judges deemed disqualified have jurisdiction to deprive petitioners of procedural due process, just compensation and equal treatment with summary dismissal of petitioners' verified civil complaint.

8. Whether a public entity may conspire to take private property for public use by fraudulent land use zoning and abusive eminent domain powers without procedural due process, equal treatment and just compensation.

9. Whether published lower state court appellate opinion, Placer County Superior Court No. 41105, Zisk v. City of Roseville et. al., 56 C.A. 3d 41; 127 Cal. Rptr. 896; Civ. No. 15121 Third Dist. Feb. 20, 1976 should be reviewed by the United States Supreme Court for "plain error" and reversed.

10. Whether lower state court eminent domain proceeding, Placer County, California Superior Court No. 41104, City of Roseville v. William J. Zisk and Lois E. Zisk, November, 1977, should be reviewed by the United States Supreme Court for "plain error"; annulled and rescission granted with the relief demanded in United States District Court for the Eastern District of California, case[s] Number[s] Civ-S-95-02134 GEB/GGH, William J. Zisk and Lois E. Zisk v. City of Roseville et. al., and Civ-S-97-0426 GEB/GGH, William J. Zisk and Lois E. Zisk v. City of Roseville, California et. al.; Ninth Circuit Court of Appeals Number[s] 97-17048 and 98-16722, respectively.

11. Whether petitioners have been denied the constitutional right to a jury trial with the amount in excess of twenty dollars in controversy.

12. Whether petitioners' private property was seized and searched without writ or warrant nor supported by probable cause.

13. Whether respondents are in default and lack standing in the proceedings.

STATEMENT OF PARTIES

The caption of the case in this court contains the names of the parties to the proceedings in the Ninth Circuit Court of Appeals. At the time of filing of this writ of certiorari, petitioners have a closely related appeal pending in the Ninth Circuit Court of Appeals, scheduled to commence briefing on February 18, 1999. Petitioners hereby respectfully request a stay of briefing in that matter pending disposition of this matter by the Supreme Court. The actions involve some of the same parties, and are based on the same or similar claims, the same property, transaction or event, similar questions of fact and the same question of law.

Pursuant to 28 U.S.C. § 2101(e) and Supreme Court Rule[s] 11, 12(4.), 12(6.), petitioners respectfully request the additional parties and appeal number[s] 97-17048- DC# CV-95-02134-GEB and 98-16722 - DC# CV-97-00426-GEB/GGH be joined as captioned below, before judgement of the latter in the Ninth Circuit Court of Appeal

WILLIAM J. ZISK and LOIS E. ZISK,
Plaintiffs/Appellants/Petitioners

vs.

CITY OF ROSEVILLE, CALIFORNIA; OWEN H. WALTRIP; BARON REED; KENNETH F. ROYER; GILBERT A. DURAN; HARRY CRABB, JR.; MEL HAMEL; WILLIAM SANTUCCI; PAULINE ROCCUCCI; RICHARD ROCCUCCI; JOHN M. BYOUK; THOMAS CHAMBLISS; MARTHA RILEY; GEORGE BULJAN; JUNE WANISH; KEITH F. SPARKS; WILLIAM OWEN; G. RICHARD BROWN; DENNIS DECUIR; MICHAEL F. DEAN; STEVEN BRUCKMAN; MARK J. DOANE; ROBERT HUTCHISON; ALLEN E. JOHNSON; STEVEN DILLON; PATTY DUNN; FREDERICK L. BARNETT; LARRY PAGEL; JAMES D. GARBOLINO; J. RICHARD COUZENS; JAMES D. ROEDER;

Defendants/Appellees/Respondents

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1998

WILLIAM J. ZISK AND LOIS E. ZISK
Petitioners

vs.

CITY OF ROSEVILLE; JUNE WANISH; GEORGE A. BULJAN; RICHARD ROCCUCCI; THOMAS CHAMBLISS; JOHN M. BYOUK; MEL HAMEL; WILLIAM SANTUCCI; PAULINE ROCCUCCI; HARRY CRABB, JR; MICHAEL F. DEAN; STEVEN BRUCKMAN; G. RICHARD BROWN; FREDERICK L. BARNETT; MARTHA RILEY;
Respondent(s)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

William J. Zisk and Lois E. Zisk, the petitioners, respectfully prays that a writ of certiorari issue to review the memorandum of the Ninth Circuit Court of Appeal entered in this case on August 20, 1998.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals whose memorandum is here sought to be reviewed is unreported and is printed in Appendix A, pages 1 - 3. The judgment of the District Court of the Eastern District of California at Sacramento is printed in Appendix B, pages 4 - 12.

STATEMENT OF JURISDICTION

The memorandum of the Ninth Circuit Court of Appeals, [Appendix A, pages 1 - 3] was entered on August 20, 1998. A timely petition for rehearing was denied on November 20, 1998 (Appendix C, page 13). The jurisdiction of the Court is invoked under 28 U.S.C.A. § 1254 (1); 28 U.S.C.A. § 2106; 28 U.S.C.A. § 2101 (c)(e); 28 U.S.C. § 1651; § 1291; § 1331; § 1343

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FOURTH AMENDMENT
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FOURTEENTH AMENDMENT

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FEDERAL RULES OF CIVIL PROCEDURE

RULE:
8(a)
12(a)(1)(A)
54(a)(b)(c)
55(a)(b)(1)(2)
58
79(a)(b)

STATEMENT OF THE CASE

Petitioners purchased a 12.2 acre parcel of land in central Roseville in 1966, located at 205 Thomas Street, Roseville, California (hereafter subject property). The parcel contains two (2) single family residences and two (2) assessory buildings and fifteen hundred feet of Dry Creek traverses the subject property.

At the time of purchase, the zoning and land use designation was R1 and R1-FP, medium density, single family residences. The majority of the entire parcel was designated above and outside of the established 100-year floodplain elevations. The site has been the basis of sand and gravel and trucking operations since the turn of the century. Petitioners are self employed and have resided and conducted their sole livelihood in the sand and gravel and trucking business on the subject property since 1966.

On February 23, 1967 petitioners presented an application to respondents planning department to construct a new single family residence on petitioners private property. Present in an advisory capacity during the public hearing was then Roseville city attorney, Keith F. Sparks. As a condition of approval, respondents required petitioners must first clean and straighten the portion of Dry Creek and adjacent that traverses the subject property and obtain a lot split. No time constraints were placed on the conditional use permit application as granted. Petitioners immediately obtained the necessary stream alteration permits from the California Department of Fish and Game, purchased the necessary heavy duty dragline equipment for dredging the stream, utilized petitioners dump truck and rubber tired front end loader and commenced to fulfill respondents conditional requirements precedent to construction of petitioners new residential dwelling, while continuing to maintain the sand and gravel and trucking business operations on site.

On March 20, 1968 by Resolution Number 68-21, respondents adopted a Park and Streambed Plan as an element of the General Plan showing petitioners' entire 12.2 acre parcel as a "future" proposed public park site.

Upon petitioners nearing completion of the monumental herculean task commenced on February 23, 1967 as required by respondents, on December 8, 1971, respondents then required of petitioners by Interim "Emergency" Ordinance Number 1158, that in order to complete the permit application, an additional grading permit and renewal of the California Department of Fish and Game stream alteration permit would now be required. Petitioners immediately applied for the "additional" grading permit, which was subsequently granted on January 24, 1972.

On August 30, 1972, by Resolution Number 72-75, respondents adopted an "Interim" Open Space Plan as an element of the General Plan. Petitioners' R-1 zoned property was now designated as open space.

On November 29, 1972, respondents adopted Ordinance Number 1190 relating to environmental review of permits issued by the City of Roseville, and declaring the same to be an "emergency measure" to take effect immediately.

On March 1, 1973 petitioners requested the parcel map and lot split to create a parcel to build their new home on the subject property in compliance with the original conditional use permit application granted on February 23, 1967. On March 14, 1973, respondents now determined that the construction of petitioners new single family residence on their R-1 zoned parcel would now have a "non-trivial" effect on the environment and an environmental impact report was now required before any further processing of petitioners permit application would be allowed even though no such E.I.R. was required back on February 23, 1967. Petitioners appealed such determination to the Roseville City Council, pursuant to Ordinance No. 1190, which was subsequently denied on April 25, 1973.

On April 25, 1973 respondent public works director, Frederick L. Barnett, revoked his previous granted January 24, 1972 grading permit and directed that all work within seventy-five feet of Dry Creek on petitioners' property shall cease.

Petitioners immediately retained the services of a local engineering firm, Atteberry and Associates, at substantial cost to petitioners, to fulfill the requirements of respondents, as set forth in Resolution 72-94. Petitioners submitted the environmental study entitled - ENVIRONMENTAL IMPACT STATEMENT FOR BILL ZISK RESIDENCE, THOMAS STREET, ROSEVILLE, CALIFORNIA 95678, dated June 1973.

The purpose of the E.I.S. was to identify, assess and quantify the impact of the development of a single-family residential structure adjacent to Dry Creek on the physical, biological and socio-economic aspects of the Roseville community. The purpose of the project is to provide a home for the Zisk family adjacent to and overlooking Dry Creek in an area of outstanding beauty. The proposed home site is located above and outside the Intermediate Floodplain (146.00 feet above mean sea level) as determined by a study of the United States Army Corps of Engineers, dated May 1973.

The work performed by Mr. Zisk on cleaning and straightening the channel of Dry Creek has changed the channel's coefficient of roughness and has consequently increased the channel's flood carrying capacity approximately 200%. The E.I.S. concluded with:

"The proposed project is the culmination of a seven year program undertaken by the Zisk family in 1967 to clean up and improve a piece of creek side property that has been exploited for many years and allowed to deteriorate into an eyesore and community health problem. It is in compliance with existing zoning and has no long-range unavoidable adverse impact. The work accomplished to date by the Zisk family indicates the quality of their goals and the ultimate benefit to the community in improved health conditions and scenic qualities".

By Ordinance Number 1190, adopted by respondents on November 29, 1972, the E.I.S. would be approved if respondent registered no objection within fifty (50) days of submittal. Over one hundred (100) days later, without prior objection to the E I.S., the Planning Commission refused to issue the lot split and use permit on September 13, 1973.

On June 20, 1973, by resolution Number 73-56, respondent adopted an Open-Space and Conservation Element of the City of Roseville General Plan. Petitioners property was thereby designated open space for park purposes.

On July 13, 1973, in responding to the draft environmental impact report for the Bill Zisk residence in Roseville, California, the United States Army Corps of Engineers stated that since in the case in point the house itself would be outside of the intermediate regional flood zone, the project itself would not have a significant effect on water surface elevations on Dry Creek during the occurrence of the intermediate regional flood.

On July 24, 1973, respondent planning director wrote to the Sacramento District Corps of Engineers requesting a "re-study" of the proposed parcel map of the Zisk property and would therefore withhold further processing of the proposed parcel map.

On August 29, 1973 respondent City Council adopted a "tentative" plan for a "future" proposed bicycle trail through the middle of petitioners proposed residential home site location.

On August 31, 1973, respondent public works director, Frederick L. Barnett, wrote to the Sacramento District Corps of Engineers requesting transposition of floodplain mapping, based upon outdated "1956" topographic maps, which did not reflect any of the Zisk family seven year reclamation project on Dry Creek on petitioners property.

On September 5, 1973, respondent public works director, Frederick L. Barnett wrote to respondent Planning Director recommending denial of a parcel map for petitioners' property, based upon the adverse

impacts of a tentative plan for a future proposed bicycle trail through the middle of petitioners proposed home site.

On or about September 13, 1973, the respondent Planning Commission in furtherance of a total and conjunctive plan, purpose, scheme and design of the Park, Streambed and Recreation Element, and the various Floodplain Ordinances heretofore mentioned, the Open Space and Conservation Element of the General Plan and the Open Space Zoning Ordinance and in ignoring the Environmental Impact Report of June 1, 1973 which states that plaintiffs' development would have no adverse impact on the environment, and for no valid or lawful cause and without any evidence to the contrary, did summarily deny petitioners' February 23, 1967 application for a land use permit and lot split. Said denial was in furtherance of the aforementioned plan, purpose, scheme and design of respondents.

Petitioners appealed said decision to respondent City Council and on or about October 3, 1973, said City Council, pursuant to and in furtherance of the plan, purpose, scheme and design of the Park, Streambed and Recreation Element and the Open Space and Conservation Element, and in spite of the June 1, 1973 Environmental Impact Report, and for no valid or lawful cause, and with no evidence to the contrary, and in violation of law did summarily deny petitioners' said appeal for the following reasons as specified by the October 3, 1973, Council Meeting Minutes:

> "Motion by Reed, seconded by Waltrip, that the Planning Commission's decision to deny the use permit for property at 205 Thomas Street be affirmed on the basis of evaluation of City of the Environmental Impact Report, the conflict with the bike and pedestrian trail as tentatively approved by the City Council and conflict with its development, and further that the plan is in conflict with the Park and Streambed Plan, an Element of the General Plan, and that council give notice that City intends to purchase a bike and pedestrian trail system along the streambed".

Said denial without a hearing or other procedure as required by the Fifth and Fourteenth Amendments to the United States Constitution did constitute a denial of substantive and/or procedural due process of law as guaranteed by said amendments to the United States Constitution.

All of respondents hereinbefore stated acts, conduct and statements were initiated and consummated with the sole motive and intent being to deny petitioners there due Constitutional rights, by deliberately and

fraudulently preventing William J. Zisk and Lois E. Zisk from developing either the portion of the subject property subsequently condemned or its remainder for any lawful use, other than parks and recreation use, and hence in furtherance of the respondent express and/or implied purpose, plan, scheme and design to depress the fair market value of the subject property and/or prevent an increase in the fair market value of the subject property so as to economically benefit the respondents to acquire the subject property.

The adoption of the aforesaid Park, Streambed and Recreation Element, the various Floodplain Ordinances, the Open Space and Conservation Element to the General Plan and the aforementioned Open Space Ordinance by respondents, was designed to and did in fact depreciate the full market value of all of petitioners' subject property; did constitute a de facto taking of all of the subject property; did prevent any development for its highest and best use; did deprive petitioners of any practical, beneficial or economical use of the subject property; and was confiscatory in nature as applied to the subject property and therefore in violation of the Fifth and Fourteenth Amendment to the United States Constitution and Article 1, Section 19 of the California State Constitution.

As a direct and proximate result of all of respondents' acts, conduct and statements, petitioners' subject property has been rendered without any practical, beneficial or economical use and petitioners have further been required to hold said property solely for the use and benefit of respondents' public use, without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 19 of the California State Constitution.

Respondents' acts, conduct and statements in denying petitioners' application for use permit and lot split as herein alleged, are unreasonable, oppressive discriminatory confiscatory as applied and a prelude to a direct condemnation action in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 19 of the California State Constitution, that as a direct and proximate consequence and result of respondents' acts, conduct and statements, petitioners have been prevented from using or developing said property for any lawful private purpose and have been unable to derive value, rents, revenues or profits from the subject property, all the while being required to spend money for taxes and other holding costs in maintaining the subject property.

All of respondents' acts and conduct herein alleged and otherwise were and are illegal, oppressive and unreasonable, and constitute a de facto taking and damaging of the subject property, for and in connection with a public use and purposes, to-wit: park, recreational and open space uses, without just compensation and in violation of the Constitution and laws of

the State of California including, but not limited to Article I, Section 13, and Article 1, Section 19, of the Constitution of the State of California, and all in derogation of the Constitution and laws of the United States, including, but not limited to, the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

Petitioners believe and therefore allege that their administrative remedies, pursuant to respondents' ordinances and state law, were effectively exhausted on October 3, 1973, the date of taking, that to apply to respondent, city, or any of its agents or departments would constitute an idle act.

Thereafter, in furtherance of the plan, purpose, scheme and design as alleged herein, and to further accomplish a depreciation in the fair market value of the subject property taken by respondents for a public use, so as to avoid payment of just compensation, respondents' Floodplain Committee and Planning Commission, both agents of said respondents and while acting within their respective scope of employment, determined to further restrict use of the subject property by including all of said property within a permanent floodplain area.

Petitioners attended public hearings precedent and relative to respondents' final adoption of permanent Floodplain Ordinance. On such occasions, objected to said Floodplain Ordinance and the proposed floodplain zone area as being vague, arbitrary, and in furtherance of respondents' plan, purpose, scheme and design to acquire the subject property for a public use, after depreciating its fair market value. Petitioners related to respondents that a Petition for Writ of Mandate relative to Respondents' October 3, 1973, denial of petitioners' request for use permit and lot split, had been filed against respondent on November 1, 1973, and that a claim, pursuant to the provisions of Title 1, Division 3.6 of the Government Code of the State of California, had been filed against respondent on November 12, 1973, for damages in inverse condemnation.

Respondent City Council thereafter, in spite of petitioners' Petition for Writ of Mandate and claim for damages, on or about November 28, 1973, and in furtherance of respondents' plan, purpose, scheme and design to acquire the subject property for public use after depreciating its fair market value, did adopt Ordinance No 1224 relative to permanent regulations of land uses within possible flood areas and Ordinances No. 1227, adding Subsections 161 and 162 to Section 30.01A of Article 3 of respondents' Ordinance No 802, designating certain property in and along Dry, Linda, Cirby, and Antelope Creeks as within the permanent FW (Floodway) and FF (Floodway Fringe) combining zones, all in furtherance of the plan, purpose, scheme and design as herein alleged.

Petitioners are informed and believe and thereon allege that in adopting Ordinance No. 1224 and Ordinance No. 1227 the respondents relied in part on a study specially prepared for respondents by the Sacramento District Corps of Engineers, Department of Army, when the Roseville City Council adopted the aforementioned Floodplain Ordinances. Petitioners are informed and believe and thereon allege that, in fact, this report by the Corps of Engineers was conducted in May, 1973 for the benefit of respondents and does not reflect the actual boundaries of previous floods or determinative flood histories or studies, and were fraudulently applied to antedated "1956" topographic maps, which were allegedly furnished to the Corps by the Roseville Public Works Department and did not reflect the current topography of the subject property in 1973 and therefore cannot properly be relied upon by the respondents.

All of the subject property is now included within the boundaries of said Floodplain Ordinances and said boundaries coincide, in furtherance of respondents plan, purpose, scheme and design as mentioned above, with the Open Space and Conservation Element, the aforementioned Open Space Ordinance, and the aforementioned Park, Streambed and Recreation Element of the General Plan.

All of the subject property referred to immediately above has been discriminated against by respondents, its agents and various departments. Only the subject property is covered by the Floodplain Ordinances and the Park, Streambed and Recreation Element of the General Plan. Thereby imposing a double restraint upon petitioners' property. No other property in the area is covered with such a "double restraint."

The placing of a "double restraint" on petitioners' property was done in furtherance of respondents aforementioned plan, purpose, scheme and design.

The adoption of said permanent Floodplain Ordinances, are vague and arbitrary in terms of boundaries was in fact a gross misexercise of police power and a further de facto taking and further devaluation by direct legal restraint of petitioners property, all in furtherance of the plan, purpose scheme and design as alleged herein.

Pursuant to the provisions of Title I, Division 3.6 of the Government Code of the State of California relative to claims for damages against local public entities petitioners could not file the complaint in inverse condemnation until their pending claim against respondents was approved or denied, or upon the expiration of forty-five days from the date of filing said claim.

On or about November 12, 1973, petitioners did file a claim for damages, and that on December 19, 1973, respondent did approve petitioners' claim in part and did deny the claim in part.

Thereafter, and in furtherance of and pursuant to the total plan, purpose, scheme and design herein alleged, and in an attempt to deny to petitioners their legal remedies secured by an action in inverse condemnation, respondents' City Council, did also on December 19, 1973, adopt Condemnation Resolution No. 73-122 relative to a portion of the subject property for public park and "future" bicycle path purposes, and on December 20, 1973, respondent filed a complaint in eminent domain in Placer County Superior Court Action No. 41104 to acquire a portion of the subject property for said proposed public use, without complying with all of the legal conditions precedent to filing an action in eminent domain and contrary to the express intent of the Legislature.

Respondents herein alleged conduct and cursory acts were in furtherance of the aforementioned plan, purpose, scheme and design of respondent city, and was consummated in defiance of such conditions precedent relative to the institution of an eminent domain action by a public entity as are specified in Government Code Section 7267 requiring an appraisal of the property to be taken and good faith negotiations with the property owner, and respondent also failed to demonstrate whether sufficient public funds are available to acquire said portion of the subject property and whether the "proposed" public park and bicycle path are so compatible with the subject property environment as to comply with State and Federal environmental regulations.

Respondents herein alleged conduct was in derogation of State and Federal statutes mentioned above, but not limited thereto; the Constitution of the State of California; and the Constitution of the United States of America in that, among other things respondents had, as evidenced by their unprecedented immediate filing of an eminent domain suit in violation of the aforementioned statutes and constitutional provisions, decided before hearing all the evidence in the case that respondents plan was to be taken in part rather than in the whole and thus depriving petitioners of their right to a hearing under the due process clause of the United States Constitution and in denial of the aforementioned statutes and constitutional provisions.

Petitioners, on or about November 1, 1973, did file an action in Administrative Mandate against respondent city and its councilmen to comply with all requirements for exhaustion of administrative remedies. All of the actions of respondents herein referred to were null and void because not enacted in the manner provided by law, that said acts were unreasonable, arbitrary, discriminatory, fraudulent, and an abuse of legislative discretion vested in the City Council and all agencies and commissions of the City and that said acts would and did constitute a taking and/or damaging of petitioners' property without payment of just compensation contrary to the provisions of the Constitutions as

hereinabove alleged, and such acts were done in furtherance of respondents aforementioned plan, purpose, scheme and design.

Respondents commenced the eminent domain proceeding on December 20, 1973, Placer County Superior Court No. 41104, to take over one-half of petitioners' subject property as described herein above. In furtherance of and pursuant to the total plan, purpose, scheme and design as herein alleged, and in further attempt to deprive petitioners of due process, just compensation and equal protection of the law, respondents failed or refused to timely deposit the "total sum" of the judgment into court. As a direct and proximate result and consequence of the wrongful, illegal, and oppressive activities and conduct of respondents, petitioners have not received one cent in any form of compensation to the present date, in violation of the Constitution and laws of the State of California including, but not limited to Article I, Section 13, and Article 1, Section 19, of the Constitution of the State of California, and all in derogation of the Constitution and laws of the United States, including, but not limited to, the Fourth, Fifth and Fourteenth Amendments of the Constitutions of the United States.

On November 6, 1973 a petition for writ of mandate was filed to compel issuance of the use permit prior to the adoption of the floodplain-zoning ordinance. A claim was also presented to the City for damages on November 12, 1973. On November 28, 1973, the City Council adopted permanent floodplain zoning ordinances numbers 1224 and 1227, to take effect in thirty days.

On December 19, 1973 respondent City Council adopted a Resolution of Intent to Condemn (No. 73-122), pertaining only to petitioners new home site and only with respect to the portion adjacent and parallel to the stream, which had been the subject of the seven-year reclamation effort. The condemnation resolution was passed even though the city did not, and had not adopted any specific bicycle trail project or plan, and prior thereto, did not conduct a feasibility study, did not demonstrate that sufficient funds were available for acquisition, did not have any part of the Zisk property appraised to establish the fair market value or severance damages, did not make an offer to purchase, did not enter into any negotiations for acquisition, did not certify an E.I.R. for a proposed project, and to this very day have not done so for any other adjoining property in the city.

A race to the courthouse occurred the very next day, December 20, 1973. The city filed an instant action in eminent domain, Placer Superior No. 41104, and petitioners filed their inverse condemnation and civil rights complaint just minutes apart on the "same date" (Placer County Superior Court No. 41105). The trial court entered a judgment dismissing the civil

rights action, and abating by interlocutory judgment the inverse condemnation cause of action due to the pendency of the city's condemnation action and to retain jurisdiction over the subsequent action. Petitioners were now being required to proceed within the confines of the city's eminent domain action. Immediately thereafter respondents filed the "lis pendums".

Petitioners property was thus condemned for a speculative, future purpose contrary to the express requirements for the exercise of eminent domain powers which twenty-five years after its exercise, remains as unfulfilled as it did in 1973. In that period of time, petitioners' property is the only parcel ever taken from private ownership in the entire city. The abuse of the eminent domain power was clear then and is even more compelling now.

On November 6, 1974, without "any" knowledge, whatsoever, or participation of petitioners, petitioners attorney, Richard F. Desmond and respondent city attorney, G. Richard Brown mutually agreed to enter into a "secret" stipulation, purporting to waive petitioners' right to recover their litigation expenses and attorney fees in the condemnation proceedings. Attorney Desmond did not divulge the existence of the secret stipulation to petitioners until November 23, 1977, at the conclusion of the six (6) week eminent domain trial, while William J. Zisk was on the witness stand.

The trial court, per Judge Harold P. Wolters, dismissed petitioners' civil rights cause of action in Placer County Superior Court No. 41105, *Zisk v. City of Roseville*, 56 C.A. 3d 41; 127 Cal. Rptr. 896, thereby generating appeal Civil No. 15121 in the Third District Court of Appeals on February 20, 1976, "prior" to commencement of the eminent domain proceeding (No. 41104) on November 1, 1977.

Six appeals have been generated throughout the condemnation proceeding. The only opinion that has been published is contained in *Zisk v. City of Roseville* 56 Cal. App. 3d at 41-51. The opinion itself contains an important error in the introductory portion, which purports to review the factual and procedural history of the case. The error remains significant because every subsequent appeal considered this opinion to be an impeccable source of information regarding the earliest history of the case. The erroneous portion relates to the timing of petitioners' original application for the building permit, and the adoption by respondent of a Park and Streambed Element to the General Plan. The opinion correctly recites that respondents adoption of the Park and Streambed Plan occurred in March 1968, while incorrectly reciting that the application for petitioners building permit did not occur until March, 1973. The appellate court relied upon this chronology to conclude, "the plan was adopted five years 'before' petitioners applied for the land use permit" (56 Cal. App 3d

at p 51). In fact, petitioners applied for the first and only land use permit on "February 23, 1967", which is recorded in the hearing minutes and was granted upon petitioners satisfaction of the seven (7) year reclamation project on the subject property and obtaining a lot split.

The condemnation trial was delayed and set to commence on November 1, 1977. On June 15, 1977, by Resolution No. 77-54, approximately four (4) months "before" the condemnation trial was set to begin, respondents adopted Resolution of the Council of the City of Roseville adopting the General Plan and repealing "former" General Plans and Plan Elements. In so doing, respondents "repealed" the Park and Streambed Plan Element of the General Plan (Resolution No. 68-21); the Interim Open Space Plan (Resolution No. 72-75); and the Open Space and Conservation Element of the General Plan (Resolution No. 73-56). The repealed elements were the basis of commencing the eminent domain proceeding in the first instance.

At this point, petitioners again encountered Keith F. Sparks who had been elevated to the Placer County Superior Court since his participation as respondent city attorney in the original permit application process. This time his role was to preside over the pre-trial conference for the eminent domain action, Placer Superior Court No. 41104. The circumstances mandated recusal upon his own initiative. Judge Sparks presided over the conference and issued a ruling, which aggrieved petitioners to this day. He ruled that evidence of bad faith and prejudicial pre-condemnation activities by the respondents would be excluded from jury consideration in the eminent domain trial.

The effect of this ruling cannot be overstated. The appellate decision on the demurrer stated that the abatement of the inverse condemnation action would be permanant "if the eminent domain proceeding is carried through to a dispositive conclusion", 56 Cal App 3d p. 48. "If for any reason the eminent domain action aborts, the first cause of action will become viable", 56 Cal App 3d p. 48.

Therefore, the city only had to survive the condemnation action to escape liability for its pre-condemnation activities. It was the obvious intention and understanding of the appellate court that all issues related to the taking of petitioners' property were to be resolved in one action. Now the trial court, through Judge Sparks, was effectively granting immunity for pre-condemnation activities by precluding their discussion altogether. Further, the land was down-zoned to floodplain "after" the time of the taking, which meant that valuation would be determined on that basis as opposed to R-l, which it had been prior to the zoning changes improperly implemented and only against petitioners property.

Armed with this devastating ruling, the city proceeded to offer $13,110.00 for the six acres of now improved, lush, level streamside property into which petitioners had poured $200,000.00 of personal funds and seven years of continuous daily efforts to meet the citys' conditions for the issuance of the building permit.

Faced with Judge Sparks evidentiary ruling excluding valuations based upon anything other than floodplain zoning, the jury verdict awarded $96,381.00, or approximately one-quarter of its R-1 zoning value.

At this point petitioners first became aware that they not only needed to be concerned about actions taken by respondents but those taken by petitioners' own attorneys. Law in effect at that time, C.C.P. 1249.3 specified, if the final offer of the public agency for the condemned property was unreasonable, the property owner could recover litigation expenses including attorneys fees, for defending the condemnation action. The disparity between the final offer of the city and petitioners final demand, when considered in light of the jury verdict clearly indicated litigation expenses would be appropriately awarded. On the motion to award litigation expenses, however, the court ruled that litigation expenses would not be awarded because petitioners' attorney, Desmond and respondent attorney Brown had executed a written stipulation on November 6, 1974, which purported to "waive" petitioners' rights to receive such litigation expenses. The existence of the "secret" stipulation came as a complete surprise and shock to petitioners especially since Desmands' attorney's fees approximated the entire award and various trial strategies had been reluctantly agreed to, solely to improve petitioners' ability to recover all litigation expenses.

Desmond admitted to petitioners on November 23, 1977, that he had committed malpractice by entering into stipulation with respondent city attorney and that, as a consequence, he had a conflict of interest. The fact that the stipulation had been in existence for three years previously without disclosure to petitioners indicates that a conflict existed during most of the course of his representation. Nonetheless, Desmond agreed to pursue reversal of the denied expenses and exclusion of evidence regarding the pre-condemnation actions taken by the respondent to down zone the subject property. Desmond later filed the notice of appeal specifying only a "portion" of the judgment to be appealed. Petitioners then hired attorney William Sherwood, to pursue the litigation expenses when Desmond reversed by surprise and withdrew from representation during appeal before the Third District Court of Appeals.

Sherwood was successful in obtaining a reversal of denial of litigation expenses on appeal and the matter was remanded to the trial court for further proceedings consistent with its ruling. The condemnation

judgment specified deposit of the "total sum", including accruing interest at 7%, as a condition of entry of a final order of condemnation. However, the respondent was granted the final order of condemnation without paying the total sum of the judgment into court. Respondent waited the full 30 days after the remittitur issued from the appellate court before making any deposit whatsoever. Said deposit occurred on May 15, 1981, and consisted of the principal amount of the judgment only, with no interest whatsoever. The respondent argued that it was entitled to offset interest because of petitioners' possession of the subject property after judgment and filed a motion to have the right to offset interest. Sherwood filed a concurrent motion for award of litigation expenses, and both motions were heard on June 12, 1981. Justice William Newsom, who had presided over the eminent domain trial, considered the issue of offset against the accrued interest and ruled that the value of the possession under the circumstances was nominal and that $750.00 per year could be offset against interest.

With respect to the question of litigation expenses, the purpose and scope of the hearing was to determine "entitlement" to expenses in accordance with the statutory prerequisites for such an award, not the amount to be awarded if such entitlement were found. The court set a later date for a determination based upon evidence to be submitted at that time, when it ruled that petitioners were to be awarded litigation expenses. The subsequent hearing on the appropriate amount of litigation expenses was never held. The obscured issue that had arisen between petitioners and respondent regarding the deposit of the correct interest amount and whether the earlier deposit of the principal amount of the judgment stopped the running of interest. This matter was argued to the court and submitted for ruling on the correct calculation of interest at the same time as the litigation entitlement issue and interest offset issue. The minute order granting litigation expenses however failed to address the interest calculation issue.

Thereafter, on September 28, 1981, petitioners' attorney Sherwood filed a motion for "implied abandonment" and "dismissal" of the condemnation proceedings, based upon former Code of Civil Procedure Section 1255a. The respondents responded by filing a motion to reconsider the award of litigation expenses. On October 9, 1981 or four days prior to the hearing on the pending motion to dismiss, the respondent deposited interest accrued to the date of deposit (May 15, 1981) of the principal amount less the annual interest offset, in the amount of $20,748.77. This amount had been withheld by the respondent based upon the claim of offset for petitioners' alleged post-judgment possession of the subject property. The deposit occurred five months "after" deposit of the principal amount of the judgment. It was the respondents' position that interest on the latter funds was not required.

The motion to dismiss based upon Code of Civil Procedures Section 1255a and the respondents' motion to reconsider the litigation expense award were both submitted on October 13, 1981. No ruling was forthcoming from Justice William Newsom until March 16, 1982. The ruling did not address either motion, but ruled instead on a matter never argued or requested, namely, the amount of litigation expenses that petitioners would recover.

Justice Newsom awarded $20,000.00 for trial counsel Desmond, $20,000.00 for Sherwood, and $2,500.00 in miscellaneous costs. The order was subsequently amended to include $18,500.00 for appraisal and engineering fees incurred in the eminent domain proceeding.

The arbitrary nature of the award is evident from the fact that counsels' fees were equal when in fact petitioners were billed $69,556.72 by petitioners' trial counsel Desmond and $21,200.52 by counsel Sherwood up to the time of the court's award. To equal the value of counsels is patently arbitrary and capricious given the evidence of actual cost incurred. This is especially true when such an award does not relieve a party of the responsibility of paying more than the court believes is reasonable. Petitioners moved to set aside this ruling on the grounds that petitioners had not been afforded a hearing, had not requested the order in the first instance and that it was patently insufficient. The motion was denied.

It was at this point that attorney Sherwood declined to represent petitioners further with respect to appeal of the litigation expenses and denial of the motion to dismiss and also with respect to an independent malpractice action against attorney Desmond. After exhaustive search, petitioners retained a third attorney, J. Collinsworth Henderson. The difficulty in locating substitute counsel arose from several factors, the complexity of condemnation actions generally, the relatively small number of attorneys who practice condemnation law, and most importantly, the reluctance of many area attorneys to pursue a malpractice action against a prominent and powerful local attorney such as Desmond. Attorney Henderson affirmatively misrepresented petitioners. Contrary to what petitioners were told, attorney Henderson had no experience whatsoever either in condemnation practice or in malpractice litigation and had no jury trial experience.

Appeal was filed asserting the impropriety of entry of a final order in condemnation, when the conditions of payment specified in the judgement had not been satisfied. Such failure resulted in an implied abandonment of the judgment and further that the litigation expenses were insufficient and fixed without an opportunity to be heard on the amount to be awarded.

Henderson prepared and filed briefs, indicating petitioners were proceeding "in propria persona". The Court of Appeal disagreed with each contention purporting that an implied abandonment required some subjective intent on the part of the public entity to abandon the proceedings before the judgment would be nullified.

The statute in question, former CCP Section 1255a, stated: "Failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceeding." Former Section 1251 stated in relevant part: "The plaintiff must within thirty days after final judgment pay the sum of money assessed . . ."

The court reasoned that the legislature intended to "protect the public entity" by enacting this section, relying upon secondary commentary of a C.E.B. author and disregarding the observations of its brethren on the bench who agreed with *County of Los Angles v. Bartlett* (1963) 223 Cal App. 2d 353, 358 that . . ."every requirement of the statute giving the least semblance of benefit to the owner must be complied with . . ." it was the legislative intention to require dismissal when the award has not been paid as provided by Section 1251 . . ."30 days".

The litigation expense issue was dispensed with summarily as well. The court held the trial judge was sufficiently aware of the value of trial and appellate counsel's services to make a determination, even in the absence of any presentation of evidence or argument directly upon the matter at issue.

Petitioners did not obtain an abandonment of the condemnation judgment or a reversal of the order awarding litigation expenses. Attorney Desmond then filed a lien against the condemnation judgment for attorneys fees in the full amount charged, which meant that approximately $69,000.00 of the $96,000.00 judgment was claimed as attorneys fees in a case where petitioners had been awarded attorneys fees. In addition, Sherwood placed a lien on the judgment for an additional $13,231.65 in fees, disallowed by Justice Newsom because they related to the abandonment and dismissal motion which he refused to grant.

The evidence was uncontroverted that respondent failed to deposit "any" interest until four days before the hearing on the motion to dismiss, by which time all of Sherwood's fees had been incurred, although petitioners had never been billed. The exclusion of the fees from the litigation expense award eroded the compensatory portion of the judgment and in fact deprived petitioners of just compensation as required by both State and Federal Constitutions.

At this point the eminent domain proceeding was splintered into a malpractice action against Desmond and a conflict with Sherwood over the claimed balance of his fees. Sherwood had agreed to handle oral argument

on the implied abandonment and litigation expense issue if petitioners agreed to give him a specific lien on any "additional" litigation expenses to be awarded by the Court of Appeal. Petitioners agreed and attorney Henderson prepared a document, which appeared to express this agreement in plain terms. When the Appellate Court refused to increase the litigation award to cover the additional fees claimed by Sherwood, he filed a motion in the original eminent domain proceeding to be paid out of the original judgment, contrary to the clear language of the agreement that such a lien would arise upon, and be solely payable out of any supplementary award by the Court of Appeal or by the trial Court on remand.

Prior to the hearing on Sherwoods' motion for payment out of the condemnation fund, Henderson had been concurrently handling the malpractice against Desmond. Henderson was given summons and complaint for amendment and service on Desmond, and appeared to have the matter under control. The history of that action reveals the inadequacy of his representation.

Desmond filed his own action for payment of attorneys fees, and, in what was then described as "an abundance of caution" by Henderson, a cross-complaint in malpractice was filed in Desmonds' fee action.

Shortly thereafter and at a point in which Henderson had been handling the Desmond malpractice action, Desmond successfully obtained a dismissal for Hendersons' failure to timely return the original summons and proof of service. Petitioners were then forced to rely solely upon the cross-complaint. This put petitioners in the procedural posture of having filed malpractice of Desmond only after he had filed against petitioners for his attorney fees, a terrible disadvantage.

Petitioners continued to receive regular and extensive billings from Henderson for work allegedly performed in preparing for trial with Desmond. Henderson had the case for 3 years without even taking Desmonds' deposition or engaging in any substantial discovery whatsoever. Sherwood filed the motion for payment of his fees out of the condemnation judgment, which remained intact pending appeal of petitioners' motion to dismiss the eminent domain proceeding as implied abandonment. Henderson declared a conflict based upon his preparation of the Sherwood agreement and filed a motion to withdraw as petitioners' attorney of record. Both Hendersons' motion and Sherwoods' motion were scheduled for hearing the same day. Prior to the hearing of both motions, but while both were pending, Henderson appeared at a trial setting conference and committed petitioners to a trial date on the Desmond attorneys fee and malpractice case. Henderson then appeared at the motion to withdraw hearing and over petitioners' objections, was allowed to withdraw. The moment the order was out of Judge Wayne Wylies' mouth, Henderson was

taking the witness stand to testify that he understood the Sherwood agreement he prepared to specify the conditions of payment to Sherwood to require payment immediately in full, out of the condemnation fund, and contrary to petitioners understanding, payment was not conditional upon recovery of additional amounts and even though he was petitioners attorney and used the term "lien", what he really meant was an assignment of a portion of the funds such that no separate action or trial was necessary for Sherwood to establish his right to the fees and payment out of the condemnation fund. Judge Wylie, incredibly granted the motion and Sherwood, was allowed to withdraw the sum of $13,231.65 immediately from the condemnation fund.

Now petitioners had to face a trial against Desmond, in pro per, to a complex malpractice case and were not prepared. Petitioners began a virtually statewide search to obtain counsel. Again, several factors consistently militated against any attorney becoming involved. The best petitioners could do was to obtain a conditional agreement to petition the trial court for a continuance of the trial date to allow discovery to be conducted by substitute counsel. Judge Wylie was not receptive to such a continuance and repeatedly berated petitioners for not having obtained counsel sooner, despite testimony that petitioners had contacted dozens of attorneys in the several months since Hendersons' withdrawal. At the continuance motion hearing, before Judge Richard Couzens, the attorneys for Desmond countered that they had discussed the case at length with the prospective attorney and his response was non-committal. Judge Couzens phoned the attorney and was not personally satisfied that he would accept the case if a continuance were granted. Judge Couzens denied the continuance request and petitioners were required to appear in propria persona at Desmonds' trial.

In petitioners' cross-examination of Desmond at trial, Desmond admitted the stipulation was a mistake, but he qualified his testimony by saying that he informed petitioners that "maybe" he had committed malpractice. Petitioners testified that his words were direct and unqualified, that he admitted he had committed malpractice by execution of the secret stipulation.

The trial Judge, Charles T. Fogerty, non-suited Petitioners on the cross-complaint, stating on the record that petitioners needed to have an expert witness testify that it was malpractice and that Desmonds' testimony and prior admission was not sufficient. Case law indicates an admission of negligence by a professional is sufficient to take the case to jury.

The jury verdict reduced Desmonds' fees from $69,556.72 to $48,000.00. Judge Couzens increased the amount by granting prejudgment interest to Desmond of $19,918.36. The prejudgment interest was

absolutely unjustified because Desmonds' demand was always more than he was entitled to. Petitioners could not have avoided the accrual of interest except by paying more than was owed. Petitioners were entitled to an offset which was unliquidated and had not been determined by a court or jury and was not therefore subject to calculation.

The failure to grant a continuance, the non-suit and the prejudgment interest award were all appealed. During the pendency of the appeal Desmonds' attorneys applied ex parte, for a writ of execution against the condemnation funds on deposit and obtained possession of the entire amount claimed, including the prejudgment interest, before petitioners were aware of the action.

Again, petitioners encountered Justice Keith F. Sparks, sitting on the panel at the state Court of Appeal, stating the denial of the continuance was not an abuse of discretion because of warning by the trial judge on several occasions to obtain new counsel and petitioners allegedly neglected or refused to do so. That the non-suit was also proper because petitioners needed an expert witness to establish damage as a result of the secret stipulation.

The trial court focused on the necessity of an expert to establish negligence, not damage, resulting there from. Damage was subject to proof, because Sherwood had to be employed to prosecute the appeal, to have the effect of the stipulation voided. The trial Court would have awarded fees in the first instance. The stipulation was secret, collusive and a fraud. Petitioners testified to the mental and emotional anguish it caused. Such is cognizable legal damage, which must come from the victim, not from the lawyer.

At this point petitioners turned to the actions and abuses of Henderson to provide some form of relief for the morass of actions taken and purportedly committed for petitioners' benefit over the prior three years.

Petitioners finally procured the services of yet another attorney, George Mandich, to pursue the malpractice action against Henderson. Mandich gave petitioners every indication of capability and desire to handle the malpractice action to conclusion. He was aware of petitioners' prior history of misfortune and he was particularly aware of petitioners' susceptibility to severe emotional distress and breakdown if we were once again abandoned or deceived by counsel. He assured us that he was a man of integrity.

As should be apparent by the course of things past, such was not to occur. Henderson complained for $15,000.00 "additional" fees, but quickly dismissed the action at the commencement of trial upon advice of counsel. However, Henderson did persuade the trial judge, George Yonehiro, to rule

that any actions taken by Henderson after the order granting withdrawal was issued, was irrelevant and would not be discussed before the jury. This ruling was issued in response to a motion in limine to exclude evidence of any post-withdrawal conduct. The order could not have been more erroneous or contrary to statute, rules of ethics and existing case law.
Attorney Mandich asked Judge Yonehiro if he could conduct voir dire of petitioner William Zisk as an offer of proof to test the evidentiary limits of the court's ruling. This was allowed, but when Mandich inquired as to Henderson's conduct, the court stated that he was violating the terms of the in limine order by inquiring into such matters. At this time, Henderson's counsel moved for a non-suit on the basis of insufficiency of the offer of proof.

While petitioner William J. Zisk was still on the stand with wife Lois E. Zisk in the audience, Mandich, our attorney, "left the courtroom". Everyone present assumed that the departure was temporary, but after a few minutes of silence, the court ordered the bailiff to summon Mr. Mandich back to the courtroom. Mandich was located at his car in the parking lot and stated that he would not be returning because of the court ruling.

The bailiff returned to court and reported Mandichs' response, which was a tremendous blow to petitioners. The fact that the nightmare could continue and even intensify in such a manner was and is beyond comprehension, beyond mere coincidence, misfortune, and literal belief. Judge Yonehiros' response was to question whether Henderson's counsel wanted to renew his non-suit motion. The motion was renewed. The court asked petitioners for any response, acknowledging that petitioners were operating under a "vast handicap". When no coherent response was forthcoming, the motion was granted and judgment entered for Henderson.
Petitioners filed Notice of Appeal in propria persona on August 4, 1986, discharging Mandich from representation in the process. When the members of the panel in the Third District Court of Appeal was announced to include Justice Keith F. Sparks, "again", petitioners requested recusal based upon prior involvement in the case to the point where he could not be impartial. This recusal motion was denied by written order dated March 22, 1988. A decision written by Justice Keith F. Sparks was issued April 13, 1988 which purports to grant a new trial against Henderson.

Respondents continued to purposefully increase the floodplain elevations on petitioners subject property from 146.0 feet to 151.0 feet above mean sea level.

On October 16, 1991, petitioners filed a complaint in Placer County Superior Court (No. S-1495) seeking (1) declaratory relief to determine validity of ordinance, code of civil procedure § 1060 (2)

damages for negligence and intentional tortuous conduct causing personal injury and property damage (3) intentional infliction of emotional distress.

The complaint was amended and served on respondents on October 14, 1994. On November 19, 1994 respondent moved to dismiss for lack of prosecution and in the alternative, demurrer to the verified complaint.

On December 27, 1994 pursuant to California Code of Civil Procedure § 170.3 (C), (1), petitioners filed objection to selection of Judge[s] James L. Roeder, J. Richard Couzens and James D. Garbolino. On the same date, pursuant to Code of Civil procedure § 170.1, petitioners filed statements of disqualification's for named judges to hear or participate in this matter. Respondents failed to respond within ten (10) days and were disqualified as a matter of law. Respondents proceeded to whiteout and back-date court documents to avoid disqualification and Judge Roeder summarily dismissed petitioners complaint on January 30, 1995.

On February 14, 1995, petitioners filed in the Supreme Court of the State of California, a verified petition for review of the denial of a writ of mandate to the Third District Court of Appeal. The California Supreme Court denied petitioners' petition for review on April 12, 1995.

On November 24, 1995 petitioners filed action No. Civ.-S-95 2134 EJG/GGH in Federal District Court for the Eastern District of California claiming violations of the Fifth and Fourteenth Amendments to the Constitution of the United States and conspiracy to violate and violation of petitioners civil rights.

The complaint was amended and served on respondents on February 6, 7, and 8, 1996. Absolutely "no written response", whatsoever, was received by petitioners or the district court during the twenty (20) days that followed, as required by Federal Rules of Civil Procedure, Rule 12(a)(1)(A). Entry of default follows pursuant to Federal Rules of Civil Procedure, Rule 55(a)(b)(1)(2).

Judge Garcia voluntarily recused himself on February 29, 1996, due to his prior affiliation as a partner in respondent counsels' law firm of Porter, Scott, Weiberg & Delehant. Judge Garcia was replaced with Judge William A. Shubb, whom petitioners learned had his daughter, Carrisa A. Shubb, employed as an attorney with the very same respondent counsels' law firm, Porter Scott, Weiberg & Delehant. The obvious appearance of partiality mandates the recusal of Judge Shubb pursuant to Title 28 U.S.C.A. § 455(a)(b)(1)(5)(ii)(iii) and all orders issued after petitioners' recusal motion must be vacated for lack of jurisdiction. Petitioners can not and will not entrust Judge Shubb and/or respondents' counsel with the "honor system".

Before Judge Shubb made "any" rulings in the case, petitioners requested his immediate recusal pursuant to Title 28 U.S.C.A. § 455(a). Judge Shubb refused to recuse, refused to enter default and proceeded to summarily dismiss all but one (1) cause of action in petitioners' verified civil complaint, then recused.

Judge Shubb was replaced with Judge Garland E. Burrell Jr., who refused to vacate Judge Shubbs' orders, refused to enter default and then summarily dismissed petitioners last remaining cause of action.

The record in this proceeding is uncontroverted. Respondents are in default, have never been relieved of default and are still in default and lack standing in this proceeding.

Notice of Appeal was filed on October 10, 1997 pursuant to Federal Rules of Civil Procedure Rules 54(b), 58 and 79(a). Petitioners did not waive the requirements of the separate document requirement specified in Rule 58 for purposes of a final appealable judgement, see *Bankers Trust Co. v Mallis* 435 U.S. 381, 98 S.Ct. 1117, 55 Led 2d 357 (1978).

REASONS FOR GRANTING WRIT OF CERTIORARI

The judgment of the Ninth Circuit Court of Appeals should be reviewed by this Court because the United States Court of Appeals for the Ninth Circuit has entered a decision in conflict with decisions of the United States Supreme Court and other United States Court of Appeals on the same important matter and has decided an important federal question in a way that has so far departed from the accepted and usual course of judicial proceedings and sanctioned such departure by a lower court, as to call for an exercise of the Supreme Courts' supervisory power.

The history of this litigation has been spawned by respondents' deceptive and fraudulent actions so long ago. Petitioners have been the victims of a continuous stream of tortuous conduct engaged from 1967 forward and implemented and perpetuated by every attorney, trial judge and appellate justice who has participated thereafter. Laws designed to protect citizens and property owners from the tyrannous abuse of authority and power have been disregarded at every stage of litigation resulting from condemnation. The courts have refused to correct the abuse and lawlessness upon the fallacious and destructive justification that the end justifies the means. The abuses and injustices have continued with the participants undoubtedly encouraged by court inaction. This Honorable Court may intervene to seek vindication of petitioners' constitutional rights.

It is clear that something more than misfortune or coincidence is at work in these cases. Could such a tale be the product of our legal system

operating within ordinary tolerances for error and occasional injustice? The legal system to this point has utterly failed because all participants' without petitioners' knowledge have combined to make it so. As a consequence, petitioners have improved their property by their own hands at tremendous expense of time and effort, forcibly removed from petitioners by fraudulent means, upon purported compensation that was itself preyed upon by voracious and unethical attorneys. Is this the true character of our constitutional rights and justice under our legal system?

Is it nothing more than a dangerous and foul back alley, populated by thugs who are free to gang up on all who enter seeking only what is promised at the entrance, impartial justice and the right to redress for wrongs committed? If it is not so characterized, how has it become so, for petitioners? This court must exercise its supreme powers to reverse these injustices and grant relief.

Petitioners pray for investigation that is not only necessary but appropriate to redress the wrongs obviously and demonstrable committed, to correct and punish the abuses chronicled herein. Petitioners have never had an opportunity to present to an impartial tribunal, the fraud and deceit and deprivation of constitutional rights practiced upon petitioners, which has taken petitioners' property, years of petitioners lives, petitioners entire life savings, retirement securities, emotional tranquillity, and petitioners right in pursuit of happiness to build the home of our dreams on our private property.

Please issue an order to annul the eminent domain action, based upon the extrinsic frauds perpetrated, including violations of due process, equal treatment and just compensation allowed to pass uncorrected by the interested state and federal courts. Order the City of Roseville, California, and the attorneys and judges involved to show cause why the matters transpired have been allowed to mock our system of justice. Order each to show cause that any matter stated herein is not the absolute demonstrable truth, that there are definite unclean hands.

The present status of matters is a travesty of justice, and every moment it continues is a continuing infliction of pain upon petitioners and a decay of democracy. Windows have been broken out of our vehicles, the cabin trashed, outbuildings set on fire, strange people and vehicles on our property, crank calls and we fear daily for our lives. Petitioners pray this madness and abuse stops and that those perpetrating the terrorism be brought to justice, as the result to petitioners simply seeking to keep property that is rightfully ours, and not that of the City of Roseville.

The only resolution and relief that remains is that which this Honorable Supreme Court may grant.

ARGUMENT

Title 28 United States Code Annotated § 455 defines the circumstances that mandate the disqualification of federal judges, and in particular, § 455 (a) disqualifies a federal judge from acting in any proceeding in which the judges impartiality" might reasonably be questioned". See *Liljeberg v Health Services Corp.* (1988) 486 U.S. 847, 100 Led 2d 855, 108 S. Ct. 2194.

On Certiorari, the United States Supreme Court affirmed. In determining whether a judgment should be vacated for a violation of § 455, it is appropriate to consider (a) the risk of injustice to the parties in the particular case, (b) the risk that the denial of relief will produce injustice in other cases, and (c) the risk of undermining the public's confidence in the judicial process. The court must continuously bear in mind that, in order to perform its function in the best way, justice must satisfy the appearance of justice.

There is ample basis in the record to support a conclusion that Judge Shubb violated § 455 (a) at the time he heard the case and entered his decisions, because an objective observer would have questioned Judge Shubbs' impartiality, due to his daughter, Carrisia Shubb's employment as an attorney with respondents law firm of Porter, Scott, Weiberg & Delehant.

Viewed through the eyes of an objective, knowledgeable member of the public would find a reasonable basis for doubting Judge Shubb's impartiality, with his daughter, Carrisa Shubb, employed as an attorney with respondents chosen law firm. The test is whether an objective, disinterested lay observer fully informed of the circumstances underlying the grounds on which recusal was sought, would entertain a reasonable doubt about Judge Shubb's impartiality. See *Potashnick v Port City Const. Co.*, 609 F 2d 1101, 111 (5th Cir.), Cert. Denied, 449 U.S. 820, 101 S Ct. 78, 66 Led 2d 22 (1980).

Under § 455 (a) a recusal is required when a reasonable person would harbor doubts about the judge's impartiality. See *United States v. Sciarra*, 851 F 2d 621, 634 (3rd, Cir. 1988), *Edelstein v Wilentz*, 812 F 2d, 131 (3rd Cir. 1987).

A judge, who was obliged to recuse, acts outside his jurisdiction. At the very least, he commits clear error of law. See *Moody v. Simmons* 856 F 2d 137. 143, (3rd Cir. 1988). Mandamus is the proper remedy to vacate the orders of a judge who acted when he should have recused. *New York City Housing Development Corp. v William T. Hart*, 796 F 2d 976, 979 (7th Cir. 1986).

The refusal to entered default was abuse of discretion and clear error of law. Respondents failed to file [a]ny written response to service of summons and complaint within the twenty (20) days required by Federal Rules of Civil Procedure, Rule 12 (a)(1)(A). Respondents lack standing to litigate their papers in these proceedings.

Article 111 of the Constitution limits the judicial power of the United States to actual cases and controversies. *Valley Forge Christian College v. Americans for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S. Ct. 752, 757, 70 Led 2d 700 (1982).

Title 28 U.S.C. § 2106, [28 U.S.C.S. § 2106] confers the power upon the Supreme Court to issue a "GVR" order, that is, an order granting certiorari, vacating the judgements below for clear error, and remand with direct orders for summary reversals resulting from the culpable conduct, unfair and manipulative litigation strategy of respondents.

CONCLUSION

Title 28 USC § 2106 [28 USCS § 2106] provides that "[t]he Supreme Court may vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, as may be just under the circumstances".

Petitioners hereby respectfully request this Honorable Supreme Court exercise the supreme powers conferred upon, to correct and vacate the massive continuous stream of controlling errors of law and abuses chronicled above concerning "federal questions" rendered by lower federal and state courts.

"Thirty-two years ago", petitioners embarked on a project to build the home of our dreams on "our private property". The application as submitted to respondents was in full compliance with all land use zoning regulations and general plans at that time. Today, not only does petitioners not have the home of our dreams on our private property, but our property itself has been forcibly and fraudulently removed from our possession, for no lawful reason, whatsoever, after tremendous expenditures in preparation of our home site as required by respondents. Petitioners have been forced to expend vast amounts of litigation expenses and attorney fees defending respondents abusive and unwarranted actions, while respondents systematically and fraudulently down-zoned petitioners' entire 12.2 acre parcel to a public use as noted above.

During the course of this entire thirty-two (32) year ordeal, petitioners have never received one cent in any form of compensation. Is this the true character of our constitutional civil rights?

This Honorable Supreme Court has the power and authority to end this terrible nightmare before it is too late. Issue a GVR order to the Ninth Circuit Court of Appeals directing the following:

1. Nullify and vacate the eminent domain proceeding, Placer County Superior Court No. 41104, City of Roseville v. William J. Zisk and Lois E. Zisk, December 20, 1973 for "clear error".

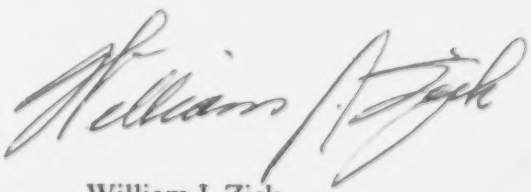
2. Vacate the judgment in the Ninth Circuit Court of Appeal Case No. 97-17048, DC# CV-95-02134-GEB/GGH for "clear error".

3. Order entry of Default Judgment in the Ninth Circuit Court of Appeal case No. 97-17048, DC# CV-95-02134-GEB/GGH for the relief demanded in petitioners verified complaint.

4. Vacate the District Court order of dismissal in the Ninth Circuit Court of Appeal Case No. 98-16722, DC# CV-97-00426-GEB/GGH for "clear error", now pending in the Ninth Circuit Court of Appeals, before judgment, to coincide with the relief demanded in related case No. 97-17048, DC# 95-02134-GEB/GGH, William J. Zisk and Lois E. Zisk v. City of Roseville, et al.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,



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William J. Zisk
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Petitioner Pro se

Dated: February 10, 1999

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM J. ZISK; LOIS E ZISK,

Plaintiffs-Appellants,

v.

CITY OF ROSEVILLE; JUNE WANISH, GEORGE A. BULJAN; RICHARD ROCCUCCI; THOMAS CHAMBLISS; JOHN M. BYOUK; MEL HAMEL; WILLIAM SANTUCCI; PAULINE ROCCUCCI; HARRY CRABB, JR.; MICHAEL F. DEAN; STEVEN BRUCKMAN; RICHARD BROWN; FREDERICK L. BARNETT; MARTHA RILEY,

Defendants-Appellees

FILED
AUG 20,1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 97-17048

D.C. No. CV-95-02 134-GEB

MEMORANDUM

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appendix A

Submitted August 17, 1998
Before: O'SCANNLAIN, RYMER, and HAWKINS, Circuit Judges.

William Zisk and Lois Zisk appeal pro se the district court's judgment for defendants in their action pursuant to 42 U S.C. § 1983 claiming their property was taken without just compensation in violation of the Fifth and Fourteenth Amendments. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

The district court did not abuse its discretion in denying appellants' request to enter default against defendants, see *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986), and in refusing to reconsider its order denying entry of default, *see School Dist. No. IJ, Multnomah County v. ACandS, Inc.*, S F.3d 1255, 1263 (9th Cir. 1993).

Further, Judge Shubb did not abuse his discretion when he denied appellants' request that he recuse himself. *See Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 871 (9th Cir. 1991). Moreover, when Judge Shubb later decided to recuse himself, the district court was not required to vacate the orders previously entered by Judge Shubb. *See Herrington v. County of Sonoma*, 834 F.2d 1488, 1502, as amended, 857 F.2d 567 (9th Cir. 1988).

The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

The Zisks' contention that the district court judgment failed to comply with Fed. R. Civ. P. 58 lacks merit. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381,384 (1978) (stating that the sole purpose of the separate document requirement is to clarify when the time for appeal begins to run). Accordingly, the Zizks' motion to
remand is denied.

All issues not raised in appellants' opening brief are deemed waived. *See Miller v. Pezzani (In re Worlds of Wonder Sec. Lit.)*. 35 F.3d 1407, 1423 (9th Cir. 1994).

AFFIRMED.

FILED

JUL 11 1997

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGEMENT IN A CIVIL CASE

William Zisk and Lois Zisk

v. CASE NUMBER: CIV S 95 2134 GEB GGH

City of Roseville, et al.,

XX -- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF JULY 11, 1997 .

Jack L. Wagner,
Clerk of the Court

ENTERED: July 11, 1997

By: _____
B. Bryant, Deputy Clerk

Appendix B

United States District Court for the
Eastern District of California
July 11, 1997
* * CERTIFICATE OF SERVICE * *

2:95-cv-02134

Zisk
v.
City of Roseville

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 11, 1997, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

William J Zisk
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SF/GEB
VC/GGH

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Kristin Engstrom
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Jack L. Wagner, Clerk

_____

by: Deputy Clerk

FILED
JULY 11 1997
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT Of CALIFORNIA
BY _____
DEPUTY CLERK

CLOSED
DATE: JUL 11 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV. S-95-2134 GEB GGH
ORDER*

WILLIAM ZISK and LOIS ZISK,
Plaintiffs,
vs.
CITY OF ROSEVILLE, et al.,
Defendants.

Defendant City of Roseville moves to dismiss Plaintiffs' sole remaining claim in this action for lack of jurisdiction. For the reasons stated below, the motion is granted.

I.

BACKGROUND

Plaintiffs in propria persona filed this action on November 24, 1995, and amended their complaint on February 2, 1996. Judge Garica, who was initially assigned the case, recused himself on February 29, 1996. The Clerk of Court subsequently reassigned the

* This case was determined to be suitable for decision without oral argument. L.R. 78-230(h).

110 1

case to Judge Shubb. Plaintiffs moved unsuccessfully to recuse Judge Shubb and to have default entered against Defendants. See Orders filed May 3, 1996.

Defendants then moved to dismiss the complaint, arguing Plaintiffs' claims were not ripe and that they failed to state a claim which would entitle them to relief. Fed. R. Civ. P. 12. On May 23, 1996, Judge Shubb rejected Defendants' argument that the Fifth Amendment taking claims were not ripe, but granted the motion to dismiss as to all but one claim on other grounds. He concluded by stating that

> [f]ollowing the entry of this order, the only cause of action of plaintiffs' first amended complaint that will remain is the § 1983 claim against the City of Roseville based upon damages caused by flooding of January 10, 1995. All other claims are DISMISSED WITHOUT PREJUDICE. Plaintiffs are granted ten (10) days from the date of this Order to file a second amended complaint consistent with this Order.

Plaintiffs did not amend the complaint within the time allotted by Judge Shubb. Instead, on June 3, 1996, Plaintiffs moved for reconsideration of the May 23 order.

On June 7, 1996, Defendants filed a second motion to dismiss, this time arguing that the action should be dismissed because Plaintiffs violated Judge Shubb's May 23 order by failing to timely amend their complaint. At a status hearing on June 24, 1996, Plaintiffs again objected to Judge Shubb presiding over the case. Based on Plaintiffs' continued protestations, Judge Shubb recused himself. See Order filed June 26, 1996. The case was subsequently reassigned to the undersigned judge.

On July 2, 1996, Defendants renoticed their motion to dismiss on the undersigned judge's law and motion calendar, arguing

that Plaintiffs violated Judge Shubb's May 23 order directing them to file an amended complaint within ten days. That motion was denied. See Order filed September 20, 1996. On August 26, 1996, Plaintiffs moved to vacate Judge Shubb's prior orders and "to enter judgment by default" against Defendants. Plaintiffs also moved for reconsideration of Judge Shubb's May 23 order. These motions were denied. See Orders filed September 20, 1996.

A Status (Pretrial Scheduling) Conference order was filed on September 20, 1996, confirming that "Plaintiffs' sole claim consists of a 42 U.S.C. § 1983 claim against the City of Roseville based upon damages caused by flooding on January 10, 1995, n and granting Plaintiffs "ten (10) days from the date this order is filed to amend their complaint to cure the defects identified in Judge Shubb's order filed May 23, 1996. . . ." Plaintiffs were cautioned that "[a]fter that date, no further amendments to pleadings is permitted except with leave of court, good cause having been shown "

On September 27, 1996, Plaintiffs filed an ex parte motion seeking an extension of time for compliance with the deadlines in the scheduling order so that they could move for reconsideration of this Court's orders (1) denying their previous motion for reconsideration of Judge Shubb's order denying their request for entry of default against Defendants, and (2) denying their motion to vacate Judge Shubb's prior orders in this case. Plaintiffs filed their motion for reconsideration on these grounds on September 30, 1996. Both motions were denied. See Orders filed October 4, 1996, and October 23, 1996.

On January 21, 1997, Plaintiffs again moved for entry of default judgment against Defendants. The motion was denied and
Plaintiffs were warned not to bring another motion for default

judgment based on Defendants' purported failure to respond to the complaint. See Status Conference Hearing, February 18, 1997.

On March 18, 1997, the City of Roseville filed the present motion, in essence, seeking reconsideration of Judge Shubb's May 23 ruling that the remaining damage claim is ripe. On April 18, 1997, Plaintiffs again moved for default judgment against Defendants, notwithstanding the Court's prior admonition.

II.

ANALYSIS

The City of Roseville argues that Plaintiffs' Fifth Amendment claim for damages caused to their property by flooding on January 10, 1995, is not ripe. Plaintiffs do not oppose the substantive basis of the motion. Instead, they continue to assert that the City of Roseville lacks standing to bring the instant motion because they are in default, a meritless argument that has been raised unsuccessfully numerous times in this litigation and will not be consider again. School Dist. No. 1J Multnomah County v• ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

In Williamson County Regional planning Commission v. Hamilton Bank, 473 U.S. 172, 194-95 (1985), the Supreme Court stated that before a taking claim can be filed in federal court against a state or local government, the plaintiff must "seek compensation through the procedures the State has provided for doing so." Plaintiffs "failure to seek compensation [through available state procedures and] in state court renders the taking claim unripe, and lack of ripeness deprives the court of subject matter jurisdiction." Sinaloa Lake Owners Asstn v. City of Simi alley, 882 F.2d 1398, 1404 (9th Cir. 1989), cert. denied, 494 U.S. 1016 (1990); see also Kinzli

v. City of Santa Cruz, 818 F.2d 1449, 1453 (9th Cir.) (a landowner must affirmatively seek compensation from the state if adequate procedures are available), modified On other grounds, 830 F.2d 968 (9th Cir. 1987), cert. denied, 484 U.S. 1043 (1988). A landowner who seeks to sue in federal court before seeking compensation from the state "bears the heavy burden of establishing that state remedies are inadequate." Del Monte Dunes v. City of Monterey, 920 F.2d 1496, 1507 (9th Cir. 1990). "A landowner fails to discharge this burden by showing that state procedures are untested or uncertain." Id. ; see Bateson v. Geisse, 857 F.2d 1300, 1306 (9th Cir. 1988) ("Until the state courts establish that [the landowner] may not obtain just compensation through an inverse condemnation action under any circumstances, [the state] procedures are adequate. . . .") "[T]he appropriate point for determining the adequacy of state compensation procedures is at the time the alleged taking occurs." Sinaloa, 882 F.2d at 1402.

Plaintiffs' property was purportedly damaged by flooding in January 1995, which they allege constituted an unconstitutional taking under the Fifth Amendment. However, they failed to demonstrate that they have exhausted state procedures or that state remedies were inadequate as of January 1995. Since California law has long provided a damage remedy for the type of taking claim asserted by Plaintiffs against the City of Roseville, Plaintiffs' claim is not ripe and this Court lacks subject matter jurisdiction over the same. Sinaloa, 882 F.2d at 1402.

III.

CONCLUSION

For the aforementioned reasons, the City of Roseville's motion to dismiss Plaintiffs' sole remaining claim for lack of subject matter jurisdiction is GRANTED. Plaintiffs' motion for default judgment is DENIED. Since all other defendants and claims have been dismissed, see Order filed May 23, 1996, or resolved, see Status (Pretrial Conference) Scheduling Order filed September 20, 1996, the Clerk of Court is directed to close this action,

IT IS SO ORDERED. Dated: July 10, 1997.

Signed

GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

United States District Court for the
Eastern District of California
July 11, 1997
* * CERTIFICATE OF SERVICE * *

2:95-cv-02134

Zisk
v.
City of Roseville

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 11, 1997, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Jack L. Wagner, Clerk
Bryant
By: Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
NOV 2 0 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 97-17048
DC# CV-95-02134-GEB
Eastern California (Sacramento)

ORDER

WILLIAM J. ZISK; LOIS E. ZISK, Plaintiffs-Appellants, v. CITY OF ROSEVILLE; JUNE WANISH GEORGE A. BULJAN; RICHARD ROCCUCCI; THOMAS CHAMBLISS; JOHN M. BYOUK; MEL HAMEL; WILLIAM SANTUCCI; PAULINE ROCCUCCI; HARRY CRABB, JR.; MICHAEL F. DEAN; STEVEN BRUCKMAN; RICHARD BROWN; FREDERICK L. BARNETT; MARTHA RILEY, Defendants-Appellees.	

Before: O'SCANNLAIN, RYMER, HAWKINS, Circuit Judges

The panel has voted to deny appellants' petition for rehearing and to reject the
suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. No further motions shall be filed or entertained in this closed appeal.

Appendix C

SUPREME COURT
FILED

MAR 2 0 1996

Clerk

DEPUTY

Third Appellate District No. C020628
S051527

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM J. ZISK AND LOIS E. ZISK Et Al., Appellants

v.

CITY OF ROSEVILLE, Respondent

Appellants' petition for review DENIED.

Mosk
Acting Chief Justice

Appendix D

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment XIV

Passed by Congress June 13, 1866. Ratified July 9, 1868.

Note: Article I, section 2, of the Constitution was modified by section 2 of the 14th amendment.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

STATUTES

TITLE 28 U.S.C.A.

Sec. 455. Disqualification of justice, judge, or magistrate

(a)Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

Appendix F

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e)No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Sec. 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Sec. 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Sec. 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section -

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Sec. 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.

Sec. 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

TITLE 42 U.S.C.A.

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Sec. 1985. Conspiracy to interfere with civil rights

(2) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 5.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

FEDERAL RULES OF CIVIL PROCEDURE

RULE:

Rule 8. General Rules of Pleading

(a) Claims for Relief.

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials.

A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11 .

(c) Affirmative Defenses.

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure To Deny.

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11 .

(f) Construction of Pleadings

All pleadings shall be so construed as to do substantial justice.

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(a) When Presented.

(1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or

(B) if service of the summons has been timely waived on request under Rule 4(d) , within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

(3) The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted.

(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters the periods of time as follows:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 , and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56 .

(c) Motion for Judgment on the Pleadings.

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 , and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56 .

(d) Preliminary Hearings.

The defenses specifically enumerated (1)--(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion For More Definite Statement.

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike.

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion.

A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defense

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Rule 54. Judgments; Costs

(a) Definintion; Form.

"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the
report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties.

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment.

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(d) Costs; Attorney's Fees.

(1) Costs Other than Attorneys' Fees.

Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed
only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) Attorneys' Fees.

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78 . The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a) , and a judgment shall be set forth in a separate document as provided in Rule 58 .

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C.S 1927.

Rule 55. Default

(a) Entry.

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment.

Judgment by default may be entered as follows:

(1) By the Clerk.

When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2) By the Court.

In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default.

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b) .

(d) Plaintiffs, Counterclaimants, Cross-Claimants.

The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c) .

(e) Judgment Against the United States.

No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b) : (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a) . Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d) (2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59 . Attorneys shall not submit forms of judgment except upon the direction of the court, and these directions shall not be given as a matter of course.

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) Civil Docket.

The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) Civil Judgments and Orders.

The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

(c) Indices; Calendars.

Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions."

(d) Other Books and Records of the Clerk.

The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

WILLIAM J. ZISK
LOIS E. ZISK
205 Thomas Street
Roseville, CA 95678
Telephone: (916) 782-2233
Telecopier: (916) 783-3408

Plaintiffs in Pro Per

ORIGINAL FILED
Apr 18 1997
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____
DEPUTY CLERK

DECLARATION OF WILLIAM J. ZISK AND LOIS E. ZISK IN SUPPORT OF PLAINTIFFS' COUNTER-MOTION FOR DEFAULT JUDGMENT BY COURT

NO.CIV-S-95 2134 GEB
U.S.D.C. E.D.C. L.R. 230(e)
DATE: MAY 5, 1997
TIME: 9:00 a.m.
CTRM: 6

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM J. ZISK and LOIS E. ZISK
Plaintiffs

vs .

CITY OF ROSEVILLE, CALIFORNIA, et al
Defendants

I WILLIAM J. ZISK and LOIS E. ZISK, declare:

1. I/We are the Plaintiffs' in this action.

2. The complaint in this action was timely filed on November 24, 1995 and amended on February 2, 1996.

3. Service of Summons on Defendant [s] was completed on February 6,7,8, 1996, pursuant to F.R.C.P. Rule 4(e)(1).

4. Absolutely no Defendant[s] written response whatsoever was received by plaintiffs or the Clerk of the Court during the 20 days that followed the Service of Summons.

5. The record is devoid of any written request to

Plaintiffs or the Court during the 20 days following Service of Summons, requesting an extension of time to answer, pursuant to L.R.142 of the District Court, Eastern District of California.

6. I/We absolutely did not grant an extention of time to answer the service of summons, either oral or written, to any of the defendant[s] in this action.

7. The face of the summons clearly states the following: "YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon Plaintiffs William J. Zisk and Lois E. Zisk an answer to the complaint which is herewith served upon you, within TWENTY days after service of this summons upon you, exclusive of the day of service. If you fail to do so, Judgment by Default will be taken against you for the relief demanded in the complaint." (emphasis added)

8. Indisputedly, Defendant[s] have not been relieved of being in default and are still in default. Procedurally, Plaintiffs are fully justified to a warranted due process Default Judgment by Court. Federal Rules of Civil Procedure Rule 55(a)(b)(2).

9. The record in this matter is evidence that Plaintiffs did not respond to the merits of any defendant paper. Plaintiffs consistently have objected to the lack of standing of the Defendant[s] to litigate their papers, and continue to object to the standing of defendant[s], being in default.

10. Defendant[s] City of Roseville, California; Harry Crabb, Jr.; Pauline Roccucci; Mel Hamel; William Santucci; John M. Byouk; Richard Roccucci; Thomas Chambliss; Martha Riley; George Buljan; June Wanish; Michael F. Dean; Steven Bruckman;

G. Richard Brown and Frederick L. Barnett are not an infant or incompetent person or in military service or otherwise exempted under the Soldiers' and Sailors' Civil Relief Act of 1940; and

11. Said defendant[s] have not timely appeared in this action, Notice of this application has been served as required by Rule 55(a)(b)(2).

12. Plaintiff is entitled to judgment against said defendant[s] on account of the claims pleaded in the complaint filed on November 24, 1995 and amended on February 2, 1996, to wit: Inverse Condemnation; Conspiracy to Violate and Violation of Civil Rights; Fraud; Recission.

13. The amount of judgment sought is the relief demanded in the complaint.

The matters stated herein based on personal knowledge and information are true and correct. Those matters stated under belief, I believe them to be true and correct. If called to testify as a witness in this matter I can competently testify as to matters of fact.

I declare under penalty of perjury that the foregoing is true and correct. EXECUTED this April 18, 1997 at Roseville, California 95678.

Lois E. Zisk William J. Zisk

Court: United States District Court for the Eastern District of California
Case Number: CIV-S-95-2134 GEB
Case Name: Zisk v. City of Roseville, California et al

DECLARATION OF PERSONAL SERVICE

I am a citizen of the United States and employed in the County of Placer. I am over the age of eighteen (18) years and party to the within above-entitled action. My business address is 205 Thomas Street, Roseville, California 95678, On April 18, 1997, I served the following:

DECLARATION OF WILLIAM J. ZISK AND LOIS E. ZISK IN SUPPORT OF PLAINTIFFS' COUNTER-MOTION FOR DEFAULT JUDGMENT BY COURT U.S.D.C. E.D.C. L.R. 230(e)

XXX by personally delivering a true copy thereof, in accordance with California Code of Civil Procedure § 1011. to the person(s) and the address(es) set forth below.

Terence J. Cassidy
Law Offices of Porter, Scott, Weiberg & Delehant
A Professional Corporation
350 University Avenue, Suite 200
Post Office Box 255428
Sacramento, California 95865
(one copy)

Office of the Clerk
United States District Court
Eastern District of California
650 Capitol Mall, Room 2546
Sacramento CA 95814
(Original and one copy)

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 18, 1997 at Roseville, California.

William J. Zisk

FILED
MAR
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-1310

In The

Supreme Court of the United States

October Term, 1998

WILLIAM ZISK AND LOIS ZISK,

Petitioners,

vs.

CITY OF ROSEVILLE, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TERENCE J. CASSIDY*
KRISTINA M. HALL
PORTER, SCOTT, WEIBERG & DELEHANT
350 University Avenue, Suite 200
Sacramento, CA 95825
Telephone: (916) 929-1481

Attorneys for Respondents
**Counsel of Record*

QUESTIONS PRESENTED FOR REVIEW

I. Whether parties claiming compensation for inverse condemnation may bring suit in a federal court before exhausting adequate and available state law remedies.

II. Whether recusal is required of a federal judge pursuant to 28 U.S.C. § 455 when the child of that judge is employed as an attorney by the law firm representing a party in an action before that judge, but where the child has no involvement in that action.

III. Whether the setting aside of default against a party pursuant to Federal Rule of Civil Procedure 55 and Federal Rule of Civil Procedure 79(e) is an abuse of discretion when the factual findings demonstrate "good cause" for so doing.

IV. Whether the entry of Order and Judgment by the District Court properly complied with Federal Rule of Civil Procedure 58, when the Order and Judgment were entered and filed separately on the docket of the District Court.

V. Whether the United States Supreme Court may consider, as support for granting review on petitions for writ of certiorari, issues which were not presented to the court of appeals, the decision of which was the basis for the petition for review.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not reported. It is reprinted in Petitioners' Appendix A.

The order of the United States District Court for the Eastern District of California, dated May 23, 1996, partially granting Respondents' Motion to Dismiss, is not reported. It is reprinted in Respondents' Appendix (hereinafter "App.") at 26-35.

The order of the United States District for the Eastern District of California, dated July 11, 1997, granting Respondents' Motion to Dismiss, is not reported. It is reprinted in Petitioners' Appendix B.

JURISDICTION

Petitioners request review of various adverse rulings in this case. Petitioners also request that this Court review substantively identical claims brought by Petitioners long ago in the California state courts.[1] Petitioners have invoked myriad jurisdictional bases to support

[1] Petitioners are also requesting review of *Zisk v. City of Roseville*, No. S-97-0426 GEB/GGH (E.D. Ca.) ("*Zisk II*"). That case is pending before the Court of Appeals for the Ninth Circuit; however, Petitioners have repeatedly moved to extend and/or stay the briefing schedule before the Ninth Circuit while awaiting this Court's disposition on the instant Petition for Writ of Certiorari. Notably, the District Court dismissed *Zisk II* on the grounds of collateral estoppel, in that all issues asserted by Petitioners therein were essentially identical to the matter before this Court.

review by this Court. *See* Petitioners' Petition for Writ of Certiorari at 1.

Respondents respectfully submit that jurisdiction in this Court is presently improper and accordingly object to the jurisdiction of this Court to presently grant a writ of certiorari in this matter. Respondents submit that the judgments for which Petitioners request review are not ripe for adjudication in the federal courts, as Petitioners have failed to complete the requisite exhaustion of available and adequate state remedies for inverse condemnation claims. Further, Respondents suggest that Petitioners have failed to demonstrate any cognizable "compelling" reason under United States Supreme Court Rule 10 for granting Petitioners' Writ of Certiorari. Moreover, Petitioners have not cited any legal precedent demonstrating that the decisions of the lower courts in this matter, as more fully described herein, conflict with decisions of any other United States court of appeals or with the decisions of this Court on these same matters. *See Braxton v. United States*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857 (1991). There is likewise no evidence that any of the decisions in this matter have departed from "the accepted and usual course of judicial proceedings" as to call for the exercise of this Court's supervisory power. *See* Supreme Court Rule 10.

STATEMENT OF THE CASE

A. Statement of Facts

On February 3, 1996, Petitioners filed a First Amended Complaint alleging, *inter alia*, violation of 42

U.S.C. § 1983 and inverse condemnation. These claims ostensibly arose from ordinances which were passed by the CITY OF ROSEVILLE between 1967 and 1991, and flooding, which occurred in 1986 and in 1995. Petitioner are owners of real property in the CITY OF ROSEVILLE and allege that actions taken by the CITY OF ROSEVILLE, through its City Council, in the form of passing certain city ordinances and resolutions, have resulted in injury to Petitioners in decreasing the value of property owned by Petitioners. Petitioners assert such damage occurred when the Council of the CITY OF ROSEVILLE passed ordinances which modified the land owned by Petitioners to "permanent flood plain" status; by placing sewer lines on that land, and illegally entering their property, all allegedly resulting in the land being flooded on two separate occasions. Petitioners also allege the Respondents had a plan, purpose, scheme and design to injure Petitioners in this way. These claims were rejected by the California Third District Court of Appeals. *See Zisk v. City of Roseville*, 56 Cal.App.3d 41, 127 Cal.Rptr. 896 (1976), *review denied*.[2]

B. Procedural History

After service of Petitioners' First Amended Complaint, and retention of the undersigned counsel of

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[2] Upon review, the California Court of Appeals determined that in response to Petitioners' inverse condemnation claims, the city council for CITY OF ROSEVILLE approved payment of the fair market value of the portion of the property being condemned. 56 Cal.App. 3d at 45, 49. Petitioners rejected the offers made by the city council.

record, counsel for CITY OF ROSEVILLE Respondents obtained an agreement from Petitioners that Respondents had an extension of time, up until March 18, 1996, in which to respond to the Amended Complaint. Petitioners were contemporaneously advised that a formal stipulation and order reflecting this agreement for extension of time was required to be filed with the Eastern District Court and that counsel for Respondents would accordingly prepare same and forward it to Petitioners for approval and signature. Counsel for Petitioners prepared and forwarded this Stipulation and Order to Petitioners and subsequently attempted to contact Petitioners to ascertain the status of the Stipulation and Order. Counsel for Respondents left a message but never received a return telephone call. *See* Declaration of Terence J. Cassidy, attached to Reply Brief, App. at 8-13.

The CITY OF ROSEVILLE respondents complied with the agreement as contained in the Stipulation and Order and filed a Motion to Dismiss Petitioners' Amended Complaint on March 18, 1996. Counsel for Respondents first received notice of Petitioners' attempt to disregard the stipulation relating to the extension of time on April 15, 1996, upon receipt of Petitioner's Opposition to Respondents' Motion to Dismiss.

By Order filed May 6, 1996, the district court *sua sponte* denied the request of Petitioners for entry of default due to Respondents' alleged failure to respond. App. at 14-16. The District Court found that requisite "good cause" pursuant to Federal Rule of Civil Procedure 55 existed on the grounds that Petitioners had orally agreed to an extension of time in which Respondents would answer Petitioners' First Amended Complaint, and

that Respondents had meritorious defenses to the claims being asserted. The District Court also found that there was no need for Respondents to file a formal motion in this matter since the motion would have clearly been granted in favor of Respondents. At the same time, the Honorable William B. Shubb, United States District Judge, also denied Petitioners' request for his recusal due to the employment of Judge Shubb's daughter by the law firm representing Respondents. App. at 17-25.

By Memorandum and Order filed May 23, 1996, the District Court granted Respondents' Motion to Dismiss the causes of action for inverse condemnation, conspiracy to pass adverse zoning ordinances, fraud and rescission. App. at 26-35. At that time, the District Court denied Respondents' Motion to Dismiss Petitioners' claims for damages arising from flooding occurring on January 10, 1995. From the time the Order was filed in May, 1996, to the filing of a Notice of Appeal, Petitioners repeatedly filed motions requesting reconsideration of the denials of Petitioners' motions for recusal and entry of default.

On June 26, 1996, the Honorable Judge Shubb recused himself from this case. The case was subsequently reassigned to the Honorable Garland E. Burrell. By Order filed September 20, 1996, Judge Burrell ruled on Petitioners' Motion to Vacate the prior Orders issued by Judge Shubb. App. at 49-55. Specifically, Judge Burrell found that "the mere fact that Judge Shubb chose to recuse himself because of plaintiffs' continued accusations of partiality does not demonstrate that his recusal was required under 28 U.S.C. § 455. Further, there is nothing in the record to suggest that Judge Shubb

intended to vacate orders entered prior to his recusal." App. at 51-52.

Petitioners then moved for reconsideration of Judge Burrell's Orders regarding Petitioner's motions to vacate Judge Shubb's prior Orders and the denial of request for entry of default against Respondents. *See* App. at 42. By Order filed October 23, 1996, Judge Burrell denied this request of Petitioners, and ruled that Petitioners had failed to demonstrate any basis for reconsideration. App. at 56-57. On January 21, 1997, Petitioners again moved for entry of default judgment against Respondents. *See* App. at 42. In a Status Conference Hearing of February 18, 1997, this motion was also denied and Petitioners were warned that the Court would not entertain further motions regarding this matter. *See* App. at 42-43.

On March 18, 1997, Respondents moved to dismiss Petitioners' sole remaining claim for damages caused by flooding which occurred on January 10, 1995. *See* App. at 43, 58-66. Respondents asserted that the claim was not ripe for adjudication in the federal court and thus the federal district court lacked subject matter jurisdiction over the claim. App. at 60-63. Respondents based this motion to dismiss on the grounds that Petitioners had failed to exhaust adequate state remedies which address claims of inverse condemnation. App. at 60-63. By Order filed July 11, 1997, the District Court granted Respondents' Motion to Dismiss. App. at 39-48. In addition, the District Court filed the customary Judgment in a Civil Case, No. 111 of the District Court Docket. App. at 67-69.

On July 21, 1997, Petitioners moved for a new trial, asserting that Respondents were in default and that all

orders made by Judge Shubb should have been vacated. App. at 70-71. Petitioners' motion was denied by Order filed September 11, 1997. App. at 70-73.

Petitioners then moved for Revision of Judgment in a Civil Case on October 10, 1997, again asserting that Respondents were in default and that the judgment as entered did not meet the requirements of Federal Rule of Civil Procedure 58. This motion was denied by order filed December 10, 1997. App. at 74-75.

In the interim, Petitioners filed a Notice of Appeal in the Court of Appeals for the Ninth Circuit on October 10, 1997. App. at 76-77. Following the submission of appellate briefs, the Ninth Circuit filed an unpublished Memorandum decision affirming all rulings made by the district court and denying Petitioners' Motion to remand on August 20, 1998. Pet. App. A. Specifically, the court held that the district court did not abuse its discretion in denying Petitioners' requests to enter default against Respondents, nor in refusing to reconsider the order denying entry of default. Pet. App. A. As to the issue of recusal, the Ninth Circuit found that not only did Judge Shubb not abuse his discretion in denying Petitioners' requests for recusal, but that the District Court was not required to vacate the orders entered by Judge Shubb prior to his ultimate recusal. Pet. App. A. The court likewise rejected Petitioners' assertion that the district court judgment failed to meet the enumerated standards of F.R.Civ.P. 58. Finally, the court expressly held that "all issues not raised in [Petitioners'] opening brief are deemed waived." Pet. App. A.

On November 20, 1998, the Ninth Circuit issued an Order denying Petitioners' Petition for rehearing, rejecting Petitioners' suggestion for rehearing *en banc*, and directing that no further motions be filed or entertained in the appeal. Pet. App. C.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I

Review is Not Presently Proper in this Matter Because Petitioners Have Not Sought Compensation for the Alleged Taking of Property by Respondents Through the Requisite and Adequate Procedures Provided by the State of California Thereby Rendering Petitioners' Claim for Property Damages Unripe for Adjudication by Any Federal Court

On March 18, 1997, Respondents moved to dismiss Petitioners' sole remaining claim for damages caused by flooding which occurred on January 10, 1995. Respondents based this motion on the grounds that the claim was not ripe for adjudication in the federal court and thus the federal district court lacked subject matter jurisdiction over the claim. On July 11, 1997, the court granted Respondents' Motion to Dismiss. In reaching this decision, the district court relied upon the standard as promulgated by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985). In *Williamson*, this Court held that before a takings claim may be filed in a federal court against either a state or local government, a plaintiff must "seek compensation through the procedures the State has provided for doing

so." The Ninth Circuit, adhering to *Williamson*, has similarly held that the failure of a plaintiff "to seek compensation [through available state procedures] . . . renders the taking claim unripe, and the lack of ripeness deprives the court of subject matter jurisdiction." *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). Further, any plaintiff who brings suit in federal court alleging a land-related taking before seeking compensation through the channels provided by the state must overcome a "heavy burden of establishing that state remedies are inadequate." *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990). The adequacy of state-afforded compensation processes are thus presumed adequate unless or until the state courts establish that the plaintiff "may not obtain just compensation through an inverse condemnation action under any circumstances[.]" *Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988).

Petitioners assert they were subject to an unconstitutional taking of property, due to their property being damaged by flooding on January 10, 1995. Throughout the course of litigation, however, Petitioners have neither demonstrated nor asserted they have exhausted requisite state procedures for compensation. Similarly, Petitioners have failed to demonstrate or assert that the long-standing damages remedies as provided by the State of California for precisely this type of claim are inadequate. Ironically, the very state court decision referred to by Petitioner, *Zisk v. City of Roseville*, 56 Cal.App.3d 41, 127 Cal.Rptr. 896 (1976), concerns Petitioners' claims for

inverse condemnation in the courts of the State of California for damages allegedly suffered as a result of the same facts which Petitioners herein assert.

Because Petitioners have wholly failed to exhaust available state remedies for compensation, as required by law, their action alleging an unconstitutional taking under United States Constitution Amendment V, in violation of 42 U.S.C. § 1983 is not ripe for adjudication. Thus, Respondents respectfully submit that this Court is presently without jurisdiction in this matter and that review by this Court is therefore inappropriate. Therefore, Petitioners' Petition for Writ of Certiorari should be denied.

II

Review is Not Warranted Because the Opinion of the Ninth Circuit Court of Appeals on Review Finding No Abuse of Discretion Concerning the Recusal of Judge Shubb Was Proper

In the Order of May 1, 1996, the Honorable William B. Shubb denied Petitioners' request for his recusal based upon the employment of Judge Shubb's daughter, Carissa A. Shubb, as an associate attorney with the law firm representing Respondent. Petitioners then made numerous motions to reconsider the rulings by Judge Shubb and ultimately moved to vacate the orders issued by Judge Shubb when Judge Shubb voluntarily recused himself and the case was reassigned to the Honorable Garland E. Burrell. Upon review of the matter, Judge Burrell found that "[t]he mere fact that Judge Shubb chose to recuse himself *because of Plaintiffs' continued accusations of partiality* does not demonstrate that his recusal

was *required* under 28 U.S.C. § 455." Upon review for abuse of discretion, the Ninth Circuit Court of Appeal affirmed the Order of the district court in all respects, holding that Judge Shubb was not required to recuse himself. *See Liteky v. United States*, 510 U.S. 540, 550-51, 555, 114 S.Ct. 1147 (1994); *Cauthon v. Rogers*, 116 F.3d 1334, 1336 (10th Cir. 1997); *United States v. Gordon*, 61 F.3d 263, 267 (4th Cir. 1995); *Yagman v. Republic Ins.*, 987 F.2d 622, 626-27 (9th Cir. 1993) (all holding that a court of appeals reviews allegations of judicial bias for recusal purposes for abuse of discretion).

The standard in any recusal pursuant to 28 U.S.C. § 455 is whether the impartiality of the judge could be questioned by a "*reasonable, well-informed* observer." *Matter of Hatcher*, 150 F.3d 631, 637 (7th Cir. 1998) (emphasis added). *See United States v. Antar*, 53 F.3d 568, 573 (3d Cir. 1995) (recusal appropriate if a "reasonable man, were he to know *all the circumstances*, would harbor doubts as to the judge's impartiality.") (emphasis added) (citations omitted). Under 28 U.S.C. § 455, a federal judge is expected to recuse *sua sponte*, where necessary, "in any proceeding in which his impartiality might reasonably be questioned." *Hatcher*, 150 F.3d at 637. Disqualification is mandatory if a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings." 28 U.S.C. § 455(b)(1). A judge is not, however, compelled to automatically "accept as true the allegations made by the party seeking recusal." *In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997). In fact, to the extent that facts surrounding the requested recusal are in dispute, the same

judge whose recusal is at issue makes those factual determinations and decides whether those facts should result in disqualification, always subject to review for abuse of discretion on appeal. *See, e.g., Town of Norfolk v. United States Army Corps of Engineers*, 968 F.2d 1438, 1460 (1st Cir. 1992). Further, "[m]ere conclusory allegations without supporting factual averments are not sufficient to state a claim" for recusal purposes upon which relief can be granted. *Cauthon*, 116 F.3d at 1336; *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996). *See In re United States*, 666 F.2d 690, 694 (1st Cir. 1981) ("unsupported, irrational, or highly tenuous speculation" does not constitute objective circumstances creating requisite appearance of partiality for § 455 purposes). Moreover, various federal courts have held that 28 U.S.C. § 455 does not mandate recusal of a judge on the basis of family relationship where the family member does not actively represent a party in that case. *See Weinberger v. Equifax*, 555 F.2d 456 (5th Cir. 1977) (child of judge who was an associate of law firm representing defendant before that judge did not mandate judge's recusal because § 455 provisions did not apply, as child had not actively participated in the case, and thus neither impropriety nor any appearance thereof mandated recusal); *Wilmington Towing Co., Inc. v. Capever Towing Co., Inc.*, 624 F. Supp. 1210 (E.D.N.Car. 1986) (same); 28 U.S.C. § 455(b)(5)(ii). *Compare In re Ætna Casualty & Surety Co.*, 919 F.2d 1136 (6th Cir. 1990) (*en banc*) (the presence of judge's daughter *as an attorney* in the proceeding before that judge required recusal under 28 U.S.C. § 455).

In this matter, it is clear that Judge Shubb was not required to recuse himself. Judge Shubb's daughter was an associate at Porter, Scott, Weiberg & Delehant (PSWD),

the law firm representing Respondents from August 2, 1993, to November 8, 1996. Pursuant to procedure followed by PSWD in all cases before Judge Shubb, PSWD had sworn under penalty of perjury that Ms. Shubb would have no involvement in any case coming before Judge Shubb. App. at 17-25. Moreover, Petitioners have not even alleged that this procedure as attested to by PSWD was inaccurate, untrue, or that Ms. Shubb had any involvement at any time in this matter. Further, 28 U.S.C. § 455 does not require recusal of a judge due to familial relationship so long as the family member does not actively represent a party in a case before that judge. *See* 28 U.S.C. § 455(b)(5)(ii). Moreover, the Ninth Circuit Court of Appeals has determined that recusal on the part of Judge Shubb specifically based upon PSWD's former relationship with Carissa Shubb is unnecessary under 28 U.S.C. § 455. *See Bartholomew v. Stassi-Lampman*, No. 94-16200 (9th Cir. 1994) (unpublished order, August 21, 1996).

Because the recusal of Judge Shubb was plainly not required according to statutory law and judicial precedent, Petitioners cannot assert that those orders made by Judge Shubb prior to his self-recusal should now be vacated. As Judge Burrell further noted in the Order denying Petitioners' motion to reconsider, "[T]here is nothing in the record to suggest that Judge Shubb intended to vacate orders entered prior to his recusal." App. at 51-52. Since there is no appearance of impropriety in any rulings made by Judge Shubb prior to his recusal, nor any other factor requiring recusal under 28 U.S.C. § 455, vacating orders made by Judge Shubb was

not and is not necessary. Therefore, Respondents respectfully submit that the Order of the District Court and the Memorandum Opinion of the Ninth Circuit regarding recusal and the vacating of orders made by Judge Shubb were not clearly erroneous, and are thus not appropriate for review by this Court.

III

Review is Not Warranted Because the Review by the Ninth Circuit Regarding the Issue of Default under Federal Rule of Civil Procedure 55 Was Conducted Under the Proper Standard of Review, and at No Time During Litigation were Respondents in Default

Federal Rule of Civil Procedure 55 governs defaults and provides as follows:

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

In making the equitable determination of "good cause" under F.R.Civ.P. 55, the court is required to consider (1) whether the entry of default was the result of willful or culpable conduct; (2) whether a set-aside would prejudice the plaintiff; and (3) whether the defenses raised following the entry of default are meritorious. *See Thompson v. American Home Assur. Co.*, 95 F.3d 429, 432 (6th Cir. 1996); *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984). A district court has the authority and jurisdiction to make determinations regarding the appropriateness of entering a default under F.R.Civ.P. 55(a) without effecting a formal Entry of Default or requiring the filing of a Motion to Set

Aside Default. *See, e.g., Davis v. Parkhill-Goodloe Company, Inc.*, 302 F.2d 489, 495 (5th Cir. 1962). Issues regarding F.R.Civ.P. 55 default and setting aside of default are reviewed for abuse of discretion. *O'Connor v. State of Nevada*, 27 F.3d 357, 362 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1367 (1995); *Canal Ins. Co. v. Ashmore*, 61 F.3d 15, 17 (8th Cir. 1995). Further, the actual entry of default and default judgments are disfavored and any doubts as to the appropriateness thereto should be resolved against the party seeking default. *Ashmore*, 61 F.3d at 17 (*citing Marshall v. Boyd*, 658 F.2d 552, 554 (8th Cir. 1981)).

Respondents respectfully submit *ab initio* that they are not now, and have at no time during the course of the instant litigation ever been, in default. As more fully stated above, Petitioners opposed Respondents' Motion to Dismiss on the grounds that Respondents were in default for failing to file an answer within twenty (20) days from service of the First Amended Complaint. The District Court made a factual finding that Petitioners and Respondents herein entered into an oral agreement in which Petitioners agreed to allow counsel for Respondents up to and including March 18, 1996, to respond to Petitioners' First Amended Complaint. App. at 14-16. In addition, Judge Shubb made a factual finding that Respondents had meritorious defenses to Petitioners' claims. In its Memorandum Decision, the Court of Appeals for the Ninth Circuit found that the district court did not abuse its discretion in denying Petitioners' request to enter default against defendants, nor in refusing to reconsider its order denying the entry of default. Pet. App. A.

Respondents additionally submit that the rulings of the district court and of the Ninth Circuit were proper in this matter. The record is devoid of any evidence to suggest that those factual findings as made by the district court were "clearly erroneous." Further, there is similarly nothing in the record to suggest that the denials of Petitioners' requests relating to entry of default judgment against Respondents was an abuse of discretion. To the contrary, in fact, the record clearly supports the findings of these courts. Moreover, Petitioners wholly failed to furnish any basis for reconsideration of the district court decision, and Judge Burrell accordingly and properly denied reconsideration of the matter. Thus, the relief from default was properly granted and affirmed in favor of Respondents and Petitioners' request for review should be denied.

IV

Review is Not Warranted Because the Plain Facts Demonstrate that the District Court Fully Complied with Federal Rule of Civil Procedure 58 in this Matter

Federal Rule of Civil Procedure 58 provides that "[e]very judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." *See* F.R.Civ.P. 58. *See Corrigan v. Bargala*, 140 F.3d 815, 818 (9th Cir. 1998) (holding that the time for filing notice of appeal begins when judgment is entered in compliance with Rules 58 and 79(e), requiring the clerk to enter judgment of the court in the civil docket). The purpose of this rule is to eliminate confusion as to exactly when the clock for an

appeal begins to run. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384-85, 98 S.Ct. 1117 (1978) (per curiam). This Court has further instructed that the requirements of F.R.Civ.P. 58 "must be mechanically applied in order to avoid new uncertainties as to the date in which judgment is entered." *United States v. Indrelunas*, 411 U.S. 216, 222, 93 S.Ct. 1562, 1565 (1973) (per curiam). Moreover, the Court of Appeals for the Ninth Circuit, the forum in which this matter is contested, "has held fast to a mechanical application of the 'separate judgment' rule, requiring all formalities to be observed." *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218 (9th Cir. 1990).

Respondents respectfully submit that the Judgment in a Civil Case as entered by the District Court fully complied with the requirements of F.R.Civ.P. 58. Although citing few facts and no law in support of their contention, Petitioners nonetheless apparently assert that the entry of judgment in this matter does not comply with F.R.Civ.P. 58. *See* Petitioners' Petition for Writ of Certiorari, "Questions Presented," at ¶5. Docket No. 111 of the District Court, App. at 67-69, clearly reflects the judgment entered by the District Court. This document is entirely separate and distinct from the Order of the court regarding Respondents' Motion to Dismiss. *See* App. at 39-48. Thus, judgment has been properly entered in accordance with Rule 58. Further, the District Court has previously considered and subsequently denied Petitioners' Motion for Revision pursuant to Rule 58. In addition, the Ninth Circuit affirmed the judgment of the District Court, specifically finding the Petitioners' contention in this regard "lacks merit." Pet. App. A. Therefore, Respondents respectfully submit that the judgment was properly

entered by the District Court, the rulings by the lower courts were correct, and that Petitioners' Petition for Writ of Certiorari in this matter be denied.

V

Review is Not Warranted on Any Remaining Questions Which Petitioners Assert Because Petitioners Have Failed to Demonstrate Any Factual Bases or Put Forth Any Legal Arguments Thereto to Support These Extraneous Claims

Petitioners state numerous bases upon which this Court should find review appropriate of this matter. *See* Petitioners' Petition for Writ of Certiorari, "Questions Presented." Respondents respectfully submit, however, that Petitioners have entirely failed to provide any facts or legal arguments to support their diverse allegations, save and except those as addressed by Respondents herein. Accordingly, in spite of these further attempts by Petitioners to additionally complicate the resolution of this matter, such extraneous issues are not properly before this Court for consideration, Thus, Respondents respectfully submit that review of these issues by this Court is similarly inappropriate and Petitioners' Petition for Writ of Certiorari should be denied.

CONCLUSION

Based upon the foregoing, Respondents respectfully submit that Petitioners' Petition for Writ of Certiorari should be denied.

DATED: March 18, 1999

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1998

WILLIAM ZISK AND LOIS ZISK,

Petitioners,

vs.

CITY OF ROSEVILLE, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

APPENDIX TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Terence J. Cassidy, SB#099180
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FILED
April 22, 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

ATTORNEYS FOR: Defendants CITY OF ROSEVILLE, HARRY CRABB, JR., PAULINE ROCCUCCI, MEL HAMEL, WILLIAM SATUCCI, RICHARD ROCCUCCI, THOMAS CHAMBLISS, GEORGE A. BULJAN, JUNE WANISH, MICHAEL F. DEAN, STEVEN BRUCKMAN, G. RICHARD BROWN and FREDERICK L. BARNETT

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM J. ZISK and LOIS E. ZISK,

Plaintiffs,

vs.

CITY OF ROSEVILLE, et al.,

Defendants.
_____/

CASE NO. CIV. S-95-2134 WBS GGH

REPLY BRIEF AND RELATED MOTION FOR ENLARGEMENT OF TIME PURSUANT TO F.R.CIV. P.6(b) IN SUPPORT OF MOTION TO DISMISS

DATE: April 29, 1996
TIME: 1:30 p.m.
CTRM: 2

Defendants CITY OF ROSEVILLE, HARRY CRABB, JR., PAULINE ROCCUCCI, MEL HAMEL, WILLIAM SATUCCI, RICHARD ROCCUCCI, THOMAS CHAMBLISS, GEORGE A. BULJAN, JUNE WANISH, MICHAEL F. DEAN, STEVEN BRUCKMAN, G. RICHARD BROWN and FREDERICK L. BARNETT hereby submit the following Reply Brief and related Motion for Enlargement of Time in response to plaintiffs' Opposition to the Notice of Motion to Dismiss and Motion to Dismiss.

I.

BACKGROUND

Plaintiffs oppose the Motion to Dismiss filed on behalf of the CITY OF ROSEVILLE defendants on the ground that defendants failed to file an Answer within 20 days from service of the First Amended Complaint and plaintiffs requested a Clerk's Entry of Default on or about April 8, 1996. For the reasons set forth below, plaintiffs' Opposition is without merit and defendants' Motion to Dismiss should be granted.

The facts and circumstances regarding the CITY OF ROSEVILLE defendants' response to plaintiffs' First Amended Complaint in the form of a Motion to Dismiss is more fully set forth in the Declaration of

counsel Terence J. Cassidy attached hereto as Exhibit "A" and incorporated by reference as though fully set forth herein. Essentially, counsel for the CITY OF ROSEVILLE defendants sought and obtained an agreement from plaintiffs WILLIAM J. and LOIS E. ZISK that said defendants had an extension to respond to the Complaint on or before March 18, 1996. At that time, plaintiffs were advised that a formal Stipulation and Order reflecting that extension of time must be filed with the District Court and therefore we would prepare same and forward it to plaintiffs for approval and signature. Id. There was a brief delay in the forwarding of that Stipulation to plaintiffs, plaintiffs were notified accordingly and the Stipulation was then forwarded to them on March 4, 1996, by correspondence dated February 21, 1996. See Exhibits "B" and "C", the correspondence to plaintiff WILLIAM J. ZISK and the Stipulation and Order Extending Time for Defendants to Respond to Plaintiffs' Complaint, respectively. Our office subsequently contacted plaintiffs to determine the status of the return of the Stipulation and Order, left a message and id not receive a return call.

Counsel for CITY OF ROSEVILLE

defendants complied with the terms of the Stipulation and Order by filing a Motion to Dismiss on March 18, 1996. The first notice counsel received regarding plaintiffs' apparent attempt to disregard our agreement regarding the stipulation of time was upon receipt of plaintiffs' Opposition to the instant Motion to Dismiss on April 15, 1996.

The CITY OF ROSEVILLE defendants hereby respectfully request that the District Court approve the Stipulation and Order regarding the extension of time based upon plaintiffs' previous agreement to extend that time. An original Stipulation and Order replacing the original Stipulation and Order forwarded to plaintiffs is being lodged concurrently herewith. Simply stated, plaintiffs should not now be permitted to disregard an agreement regarding an extension of time once defendants have relied upon that agreement so as to attempt to take a position of advantage over defendants.

For all of those reasons, and as more fully set forth in the Declaration of counsel attached hereto as Exhibit "A", the CITY OF ROSEVILLE defendants respectfully request that the District Court reject plaintiffs' Request for Clerk's Entry of Default and enter the Stipulation and Order

regarding the extension of time and rule upon the merits upon the instant motion to dismiss.

II.

CITY OF ROSEVILLE DEFENDANTS REQUEST AN ENLARGEMENT OF TIME TO RESPOND TO THE FIRST AMENDED COMPLAINT PURSUANT TO F.R.CIV. P. 6(b)

Based on the agreement with plaintiffs WILLIAM J. and LOIS E. ZISK, the CITY OF ROSEVILLE defendants were entitled to a Stipulation and Order extending time within which to respond to the First Amended Complaint on file herein. Without apprising counsel for defendant and/or the District Court of it their hidden intentions, plaintiffs have apparently now disregarded any prior agreement which was fully and properly relied upon by counsel for defendants thereby seeking an advantage over the CITY OF ROSEVILLE defendants. CITY OF ROSEVILLE defendants respectfully submit that the obtaining of the prior agreement of plaintiffs for the extension of time and the good faith processing of the Stipulation and Order for that extension of time constitutes good cause for the enlargement of that time pursuant to F.R.Civ. P.6(b) On that basis, the CITY OF

ROSEVILLE defendants hereby respectfully request that the District Court grant an enlargement of time for the CITY OF ROSEVILLE defendants to respond to the First Amended Complaint up to and including March 18, 1996 and thereby formally approve of the original Stipulation and Order filed concurrently herewith.

III.

THE MOTION TO DISMISS SHOULD BE GRANTED SINCE THERE IS NO OPPOSITION ON THE MERITS.

Plaintiffs have apparently chosen not to submit an opposition to the merits of the Motion to Dismiss filed on behalf of the CITY OF ROSEVILLE defendants. Defendants respectfully submit this is due to the fact that the grounds set forth in the Motion to Dismiss are well taken and dispose of this entire matter. Rather than merely repeating the bases for that motion, defendants will stand on the substance of that motion and hereby respectfully request that the Motion to Dismiss be granted in its entirety.

III.

CONCLUSION

Based on the foregoing, the CITY OF ROSEVILLE defendants respectfully request that

the court approve of the Stipulation and Order for Extension of time to Respond to the Complaint and grant the instant Motion to Dismiss on all grounds.

Dated: March 17, 1999

Respectfully submitted,

PORTER, SCOTT, WEIBERG & DELEHANT
A Professional Corporation

By

/S/ Terence J. Cassidy

DECLARATION OF COUNSEL

I, Terence J. Cassidy, declare as follows:

I am an attorney at law licensed to practice in all the courts of the State of California and in the United States District Court for the Eastern District of California and am the attorney of record for defendants CITY OF ROSEVILLE, HARRY CRABB, JR., PAULINE ROCCUCCI, MEL HAMEL, WILLIAM SATUCCI, RICHARD ROCCUCCI, THOMAS CHAMBLISS, GEORGE A. BULJAN, JUNE WANISH, MICHAEL F. DEAN, STEVEN BRUCKMAN, G. RICHARD BROWN and FREDERICK L. BARNETT in the above-captioned matter.

This matter was assigned to our office on February 14, 1996. Upon receipt of a copy of the pleadings, including the First Amended Complaint, I attempted to determine which defendants had been served with the Summons and Complaint. Initially, I reviewed this matter with Mr. Mark Doane, the Roseville City Attorney, with respect to those defendants who had advised him they had been served. Nevertheless, it remained unclear whether several of the defendants had been served.

I next contacted the plaintiffs in order to request an extension of time within which to respond to the complaint and further determine which defendants had been served. On February 20, 1996, I spoke with plaintiff Lois J. Zisk and advised her of our request for an extension of time to respond to the complaint. Ms. Zisk advised me that she would have to discuss same with her husband and she would have him contact me. On February 21, 1996, Mr. Zisk contacted me by telephone. At that time I specifically requested that the Zisks grant the CITY OF ROSEVILLE defendants an extension of time up to and including March 18, 1996, to respond to the First Amended Complaint on file in this case. Mr. Zisk agreed on behalf of plaintiffs to grant us that extension of time. I then advised Mr. Zisk that it would be necessary to file a formal Stipulation and Order reflecting that extension of time, indicated that I would prepare and forward same to them for their signatures and upon returning it to our office, would file same with the District Court. Following my conversation with Mr. Zisk, I dictated a confirming correspondence and commenced preparation of the Stipulation and Order reflecting the extension of time.

The undersigned was involved in a

jury trial in the matter of Kahn V. California Department Of Corrections, Sacramento Superior Court No. 539492, which was scheduled to commence on February 26, 1996. During the preparation of that matter for trial, there was some confusion regarding which defendants were to be included in the Stipulation and Order for Extension of Time to Respond to Plaintiffs' Complaint. While preparing for and appearing the first several days of that trial, I reviewed the Stipulation and Order at least two times and found that it was not accurate. Therefore, I directed that it not be sent until I could further review same so that the original being forwarded to the plaintiffs was complete and accurate. The Kahn trial resolved on February 29, 1996 and the original Stipulation and Order was then forwarded to plaintiffs on March 4, 1996, with the cover letter previously completed and dated February 21, 1996. True and correct copies of the correspondence of February 21, 196 and the Stipulation and Order for Extension of Time are attached hereto as Exhibits "B" and "C", respectively.

During the time there was a delay in the forwarding of the Stipulation and Order to plaintiffs, my office contacted the Zisks and advised them that there had been a brief delay

in the preparation of that Stipulation but that it would be forwarded to them as soon as possible.

Thereafter, I became involved in preparation and attendance at a binding arbitration scheduled to commence on March 11, 1996 and a jury trial in the matter of Mahon v. County of Sacramento, USDC-EDCA Civ. S-91-0998 LKK/JFM which was originally scheduled to commence on March 19, 1996, but actually commenced on March 26, 1996, and proceeded until April 15, 1996. On at least one occasion, I requested that my secretary, Kathy Michelakos, contact the Zisks to determine when we could expect to receive the fully signed and dated Stipulation and Order back from them. I made that request prior to or at the time of the preparation and filing of the Motion to Dismiss on or before March 18, 1996. My secretary specifically advised me that she in fact contacted the Zisks and left a message for them regarding return of the original Stipulation and Order. We received no further response from the Zisks until receiving the Opposition to the instant Motion to Dismiss. It should be pointed out that plaintiffs have failed to provide the court with any information regarding these conversations, the agreement to extend time to respond to the

First Amended Complaint and/or the forwarding to them of an appropriate Stipulation and Order extending time to respond.

Inasmuch as plaintiffs WILLIAM J. and LOIS E. ZISK have apparently determined to disregard their agreement regarding the extension of time, the CITY OF ROSEVILLE defendants hereby respectfully submit that good cause exists for the extension of time pursuant to F.R.Civ.P. 6(b) to extend that time. On that basis, defendants respectfully submit and lodge herewith the original Stipulation and Order now containing counsel for defendants' signature, the previous original having been forwarded to the Zisks and not returned. The CITY OF ROSEVILLE defendants respectfully request that the court approve of the Stipulation and Order at this time.

WHEREFORE, the CITY OF ROSEVILLE defendants by and through their undersigned counsel respectfully submit that they have at all times acted in good faith and in compliance with all appropriate District Court Rules and Procedures, that the extension of time previously agreed upon remains appropriate and is support by good cause, and the Motion to Dismiss is well taken and should be granted in its entirety.

The facts set forth above are true and correct and if called upon as a witness, I can competently testify to these matters of fact based upon personal knowledge.

Executed April 22, 1996, at Sacramento, California.

/S/

Terence J. Cassidy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FILED
May 6, 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

----ooOoo----

WILLIAM ZISK and LOIS ZISK

Plaintiffs,

v.

CITY OF ROSEVILLE, et al.

Defendants.

No. Civ. S-95-2134 WBS/GGH

ORDER RE: REQUEST FOR RECUSAL

----ooOoo----

Plaintiffs oppose defendants' motion to dismiss on the ground that defendants failed to file an answer within 20 days from service of the first amended complaint, and are therefore in default. Plaintiffs requested a Clerk's Entry of Default on or about April 8, 1996.

Fed. R. Civ. P. 60(b) provides for relief from default, and is to be "liberally applied." Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984). The factors a court should consider when deciding whether to grant such

relief are (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable conduct led to the default. Id"

This court finds that plaintiffs will not be prejudiced by granting relief from the default. Further, it finds that defendants are likely to have a meritorious defense as articulated in their motion to dismiss. As of yet, plaintiffs have not filed an opposition on the merits to the motion to dismiss, so this court cannot rule conclusively thereon.

Finally, defendants' conduct was not culpable. There appears to have been an oral agreement between plaintiffs and defendants wherein defendants would be allowed more time to file their answer. Plaintiffs said that they would sign a written version of the agreement if the terms were the same as those agreed to orally. Plaintiffs' only objection to the written agreement appears to be that it arrived after the deadline had passed for defendants to answer. It thus appears that there existed between plaintiffs and defendants an oral agreement allowing defendants extra time to answer the complaint, and that defendants reasonably relied upon such agreement, such that no culpable conduct on their part led to the default.

Because all three Falk factors for relief from default weigh in favor of granting such relief, plaintiffs' request for entry of default is hereby DENIED.

IT IS SO ORDERED.

DATED: May 1, 1996

/S/ WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

----ooOoo----

WILLIAM ZISK and LOIS ZISK	No. Civ. S-95-2134 WBS/GGH
Plaintiffs,	ORDER RE: REQUEST FOR RECUSAL
v.	
CITY OF ROSEVILLE, et al.	
Defendants.	

----ooOoo----

On April 25, 1996, plaintiffs filed a letter objecting to the assignment of this case to the undersigned judge. The court construes the letter as a motion for disqualification pursuant to 28 U.S.C. §§ 144 and 455. For the following reasons, that request will be denied.

Preliminarily, 28 U.S.C. § 144 is not implicated in this case because that statute applies only when a judge is alleged to have a personal bias in favor of a party rather than a lawyer or law firm. United States v. Carignan, 600 F.2d 762, 763-64 (9th

Cir. 1979). Here, plaintiffs' objection is predicated upon the fact that my daughter, Carissa Ann Shubb, is employed as an associate attorney in the law firm of Porter, Scott, Weiberg & Delehant. There is no allegation that I have any bias or prejudice in favor or against any party to this lawsuit.

A motion to disqualify a judge under 28 U.S.C. § 455 must be decided by the judge himself. See United States v. Sibla, 424 F.2d 864, 867-68 (9th Cir. 1980). The procedure followed in all cases in which the law rirm of Porter, Scott, Weiberg & Delehant represents a party in any case before me is set forth in the attached letter of understanding, dated September 16, 1993. In short, whenever Porter, Scott, Weiberg & Delehant appears before me, it constitutes a representation that my daughter has not actively participated in that matter. The firm has also agreed to apprise any opposing counsel or party or the nature of that understanding, and has further agreed that so long as the firm continues to represent a party in such a case pending before me, my daughter will take no active part in that matter.

Considering plaintiffs' request pursuant to 28 U.S.C. § 455(a) and (b)(5)(iii), I consider that it would be

inappropriate for me to recuse myself in this case. I do not find that my impartiality can reasonably be questioned by virtue of my daughter's employment by defense counsel's law firm, nor do I find that she has any interest that could be substantially affected by the outcome of this case.

Weinberger v. Equifax, 557 F.2d 456 (5th Cir. 1977), cited in the letter of understanding, is on point. There, the plaintiff appealed from the district judge's failure to recuse himself under 28 U.S.C § 455 (2) and (b)(5)(ii) upon the ground that his son was an associate of the law firm representing the defendant. The court of appeals held that because the judge's son did not actively participate in Equifax's defense none of the recusal provisions applied Wilmington Towing Company, Inc. v. Cape Fear Towing Company Inc., 624 F.Supp. 1210 (E.D N.C. 1986), also cited in the letter of understanding, is likewise similar to the situation here. In that case, the judge's son worked as a law clerk for the law firm representing the plaintiff during the summer and had tentatively accepted employment with that firm after his graduation from law school.

Because his son had not "acted" as a

lawyer in the proceeding, the trial judge found neither any impropriety nor any appearance of impropriety to justify his recusal from the case. I have also considered plaintiffs' request in light of the Code of Conduct for United States Judges. The Commentary to Canon 3C(3)(d)(ii) states that, "[t]he fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge." A recent Opinion of the Committee on Codes of Conduct confirms that

> "[w]here a judge's child is employed by a law firm in a salaried position (e.g., clerical, paralegal, associate), this fact by itself is not sufficient to raise a reasonable question regarding the judge's impartiality in cases in which the law firm appears. However, a reasonable question as to impartiality would be raised if the child actually worked on the matter before the judge or if the matter otherwise involved the child's duties. In addition, other circumstances could combine to raise a reasonable question as to impartiality. The more responsible the position with the firm which the child holds, the greater likelihood that a reasonable question as to impartiality will be raised."

I find no combination of circumstances that

would raise a reasonable question as to my impartiality. Accordingly, I find nothing in either the statutes or the Canons to disqualify me from hearing this case.

If I were to recuse myself in this case, I would have to do so in all cases in which Porter, Scott, Weiberg & Delehant represents a party. Since that firm regularly represents the municipalities of this district in § 1983 cases, the effect would be to remove myself as the trial judge in a significant body of civil cases filed in this district. Under the circumstances, I do not feel it would be fair to my fellow judges or consistent with my own obligations as a judge to cause such a result when the law does not require me to do so.

This practice is consistent with that followed by the Justices of the United States Supreme Court See Statement of Chief Justice Rehnquist, reprinted at 114 S.Ct. CXI (1993)[1]

Chief Justice Rehnquist decided that he would participate in a case in which his nephew was an associate in a law firm representing one of the parties. The Chief Justice's statement read:

I have been advised by Ronald E. Elberger,

Plaintiffs' request that the undersigned judge recuse himself is therefore DENIED.

Counsel for petitioner in this case, that he is a member of the law firm of Bose McKinney & Evans, and that my nephew is an associate with that firm. I am further advised that my nephew has not worked on the petition for certiorari nor had any involvement in the case at any prior stage of the litigation.

28 U.S.C. § 455 provides that a Justice shall disqualify himself when... (b)... a person within the third degree of relationship to [him]... (ii) is acting as a lawyer in the proceeding...

I and other members of the Court have in the past disqualified ourselves when a person included in § 455(b)(5) was an associate in the law firm representing one of the parties before this Court, even though the person had not participated in the case before the Court or at previous stages of the litigation. The-members of the Court have discussed this question among themselves, and have decided that § 455 does not require disqualification under these circumstances. Therefore, I shall participate in the consideration and disposition of this matter.

The Chief Justice's position has been adopted by the other members of the Court who might find themselves in the same situation. See Statement of Recusal Policy, 114 S.Ct. CIX-CXI (1993) (Rehnquist, C.J., Stevens, O'Connor, Scalia, Kennedy, Thomas, Ginsburg, JJ.)

DATED: May 1, 1996.

/S/ WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

September 16, 1993

Judge William B. Shubb
U.S. District Court
Eastern District
650 Capitol Mall, Room 2042
Sacramento, CA 95814

Re: **Letter of Understanding**

Dear Judge Shubb:

This letter is pursuant to our previous discussions regarding Porter, Scott, Weiberg & Delehant's recent decision to hire your daughter, Carissa Shubb, as an associate. Since Porter, Scott, Weiberg & Delehant is likely to continue having cases assigned to you, we have looked into the effect of 28 U.S.C.A. § 455, which governs the disqualification of Federal District Court judges. As we discussed, so long as Carissa is not actively involved in the proceeding, her position of associate at our firm does not require you to automatically recuse yourself as judge. See Weinberger v. Equifax (5th Cir. 1977) 557 F. 2d 456; Wilmington Towing

Company, Inc. v. Cape Fear Towing Company, Inc., 624 F. Supp. 1210.] Therefore, Porter, Scott, Weiberg & Delehant apprises you that, by virtue of appearing before you in court, Porter, Scott, Weiberg & Delehant represents that Carissa Shubb has not actively participated in the case.

Very truly yours,
PORTER, SCOTT, WEIBERG & DELEHANT
A Professional Corporation

By
/S/ Ned Weiberg
Managing Partner

U.S. DISTRICT COURT
EASTERN DISTRICT

/S/ William B. Shubb

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FILED
May 23, 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

----ooOoo----

WILLIAM ZISK and LOIS ZISK Plaintiffs, v. CITY OF ROSEVILLE, et al. Defendants.	No. Civ. S-95-2134 WBS/GGH MEMORANDUM AND ORDER RE: MOTION TO DISMISS

----ooOoo----

Defendants move to dismiss plaintiffs' inverse condemnation action for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

FACTUAL BACKGROUND

Pro se plaintiffs own a parcel of real property in the city of Roseville, California. They allege that actions taken by Roseville, through it's city council, agents, and employees, have caused them injury by decreasing the value of the property by passing ordinances down-zoning the land to "permanent floodplain" status and placing sewer lines thereon, illegally entering their

property, and causing the land to be flooded on two occasions. Plaintiffs also allege that defendants had a plan, purpose, scheme and design to injure plaintiffs in this manner.

All ordinances passed by the City of which plaintiffs complain occurred between 1967 and March 20, 1991. The illegal entry of which plaintiffs complain occurred on November 1, 1994. The floodings occurred on February 19, 1986 and January 10, 1995.

On November 24, 1995, plaintiffs filed this action before this court, stating a constitutional claim under the Fifth and Fourteenth Amendments to the U. S. Constitution and Article I, Section 19 of the California Constitution; a claim for violation of and conspiracy to violate civil rights under color of law, 42 U.S.C. §§ 1983, 1985; a claim for state law fraud; and a claim of state law rescission arising from action taken by the city council between 1967 and 1973. A first amended complaint was filed on February 2, 1996.

Defendants move to dismiss under Rule 12(b)(6) on the following grounds: that the constitutional claims are not ripe for review; that the constitutional claims for inverse condemnation cannot proceed against individual defendants; that the §§ 1983 and

1985 claims are barred by the statute of limitations; that plaintiffs have failed to state a claim upon which relief can be granted under § 1985; and that the fraud claim fails to comply with the California Tort Claims Act.

Plaintiffs oppose defendants' motion to dismiss on the ground that defendants are in default for failing to file a timely answer. This court has previously addressed plaintiffs' contention, see Order entered on May 3, 1996 (Civ. S-95-2134) (attached hereto as Appendix A), and will therefore consider the merits of defendants' motion to dismiss.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) may be granted only if it appears to a certainty that the pleader would be entitled to no relief under any state of facts which could be proven. Alonzo v. AFC Property Management Inc , 643 F.2d 578, 579 (9th Cir. 1981). When deciding a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all material factual allegations of the complaint while construing the complaint in favor of the complaining party. Gillespie v. Civiletti, 629 F.2d 637 (9th Cir. 1980). Plaintiffs' complaint must be given a liberal construction, due the

"unartful pleadings" of pro se litigants. Eldridge v. Block, 832 F.2d 1132, 1137 (9th Cir. 1987).

ANALYSIS

Although plaintiffs state two distinct causes of action, one for violation of the Fifth and Fourteenth Amendments to the United States Constitution, and another for violation of § 1983 and 1985, they will be dealt with in the same manner, since a claim under the Civil Rights Act is the proper method for redressing a constitutional inverse condemnation claim, Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1363 (9th Cir. 1978), and the same statute of limitations applies, regardless of how the claim is phrased. See Norco Construction Inc. v. King County, 801 F 2d 1143, 1144 (9th Cir. 1986).

A. Ripeness

Defendants first contend that, in order to state a claim for inverse condemnation under the U.S. Constitution, plaintiffs must first have sought and been denied compensation in state court, and cite Williamson County Regional Planning Commission v Hamilton Bank, 473 U.S. 172 (1985), in support of this proposition. Williamson does

not, however, require plaintiffs to bring a state court action where it would be futile to do so. Id. at 196-97. Here, the taking at issue took place between 1967 and 1991, as the defendants passed ordinances reducing the value of plaintiffs' land. During most of this time, before 1987, there was no action available in California courts to vindicate an inverse condemnation. Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 686 (9th Cir. 1993). Therefore, even though plaintiffs did not seek remedies in state court, they were not required to do so because it would have been futile to seek such relief at the time the alleged taking occurred. The claim is thus ripe. Id.

B. Inverse Condemnation Against Individual Defendants

Defendants next argue that, under California law, individual officers and agents of a public entity cannot be held liable in an inverse condemnation action. The cases cited, Asher v. Pacific Power and Light Co., 249 F.Supp. 671, 676-77 (N.D.Cal. 1965); Heisman v. City of Los Angeles, 30 Cal.2d 746, 756 (1947), prohibit actions for inverse discrimination brought under Art. I § 19 of the California Constitution, whereas the

inverse condemnation claim here arises from the U. S. Constitution as well.

Nonetheless, the same principle applies under the U. S. Constitution; no inverse condemnation claims may brought against individual defendants. See Wisconsin Truck Center Inc. v. Volvo White Truck Corp., 692 F.Supp. 1030, 1015 (W.D.Wis. 1988); Bieneman v. Chicago, 662 F.Supp. 1297, 1301 (N.D.Ill. 1987); Sterns v. Smith, 551 F.Supp. 32, 36 (S.D.Tex. 1982). The inverse condemnation claims against the individual defendants must therefore be dismissed.

C. Statute of Limitations

The statute of limitations for a § 1983 action to redress a Fifth and Fourteenth Amendment inverse condemnation is one year, the same statute of limitations or personal injuries in the state of California. DeAnza Properties X. Ltd. v. County of Santa Cruz, 936 F.2d 1084, 1085 (9th Cir. 1991). The same limitations period applies to claims brought under § 1935. See Taylor v. Regents of University of California, 993 F.3d 710, 711 (9th Cir. 1993).

All events of which plaintiffs complain, from the passing of the various zoning ordinances which devalued the property

to the allegedly illegal entry onto plaintiffs' property, occurred on or before November 1, 1994, with the sole exception of the flooding on January 10, 1995. The statute of limitations on a constitutional inverse condemnation challenge of a city's ordinance begins to run the date of the ordinance's enactment. See DeAnza, 936 F.2d at 1085. The statute of limitations on other challenged actions of the city begin to run when the plaintiffs know or had reason to know of the asserted injury. See Norco Construction, 801 F.2d at 1146.

Here, the ordinances complained of were all enacted in 1991 or earlier. Thus, the limitations period for any inverse condemnation claim resulting from decreased value of plaintiffs' land by rezoning as "permanent floodplain" passed in 1992 at latest, one year after the enactment of the last ordinance. Additionally, that portion of plaintiffs' claim arising from the allegedly illegal entry by defendants onto their property accrued the date of the entry, November 1, 1994. This too is barred by the one year limitations, since the complaint was filed November 24, 1995, over a year later.

The only portion of the cause of action that survives the statute of

limitations bar, then, is that arising out of the flooding of plaintiffs' property on January 10, 1995. While the court expresses no opinion as to whether plaintiffs can present evidence that the defendants caused this flood, the allegation is not barred, and therefore not subject to dismissal.

D. Plaintiffs' 42 U.S.C § 1985 Claims

It is well settled that claims under § 1985 require allegation of invidious class based discriminatory animus. See Griffith v. Breckenridge, 403 U.S. 88, 102-03 (1971). The first amended complaint contains no allegations that plaintiffs were discriminated against on the basis of race or any other invidious basis. Plaintiffs' § 1985 conspiracy claims must therefore be dismissed.

E. Failure to Comply with Tort Claims Act

Defendants also contend that the state law fraud claim is barred by the California Tort Claims Act's statute of limitations, Cal. Gov. Code § 911.2, which governs fraud claims against government entities. The limitations period is also one year for injuries to real property.

The fraud action accrues as of the date of the fraud, unless plaintiffs plead and

prove concealment of the fraudulent actions, Donabedian v. Manzer, 187 Cal.App.3d 1021, 1028 (1986), or plead and prove that they only recently (within 100 days) discovered the fraud. Toscano v. Los Angeles County Sheriff's Department, 92 Cal App.3d 775, 783 (1979). In such cases, the cause of action accrues on the date of discovery.

Here, plaintiffs have not plead any concealment on the part of the defendants, or delayed discovery on their part. Therefore, as all alleged fraudulent actions complained of in this claim occurred at least one year before the filing of the complaint, this claim is also time barred. If plaintiffs were to plead concealment or delayed discovery, this claim could potentially stand.

F. Rescission

Plaintiffs' final cause of action is for rescission of an eminent domain action filed in 1973. As this took place over twenty years before this complaint was filed, it is clearly time barred. Cal. Gov. Code § 911.2 (time of presentation of claims against government entities is one year); Cal. Civ. Proc. Code § 337 (statute of limitations of rescission action is four years).

CONCLUSION

Following the entry of this order, the only cause or action of plaintiffs' first amended complaint that will remain is the § 1983 claim ~~against~~ the City of Roseville based upon damages caused by the flooding of January 10, 1995. All other claims are DISMISSED WITHOUT PREJUDICE. Plaintiffs are granted ten (10) days from the date of this Order to file a second amended complaint consistent with this Order.

IT IS SO ORDERED

DATED: May 23, 1996

UNITED STATES DISTRICT JUDGE

/S/ WILLIAM B. SHUBB

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FILED
May 3, 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

----ooOoo----

WILLIAM ZISK and LOIS ZISK
Plaintiffs,
v.
CITY OF ROSEVILLE, et al.
Defendants.

No. Civ. S-95-2134 WBS/GGH

ORDER RE: REQUEST FOR DEFAULT

----ooOoo----

Plaintiffs oppose defendants' motion to dismiss on the ground that defendants failed to file an answer within 20 days from service of the first amended complaint, and are therefore in default. Plaintiffs requested a Clerk's Entry of Default on or about April 8, 1996.

Fed. R. Civ. P. 60(b) provides for relief from default, and is to be "liberally applied." Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984). The factors a court Should consider when deciding whether to grant such relief are (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable

conduct led to the default. Id.

This court finds that plaintiffs will not be prejudiced by granting relief from the default. Further, it finds that defendants are likely to have a meritorious defense as articulated in their motion to dismiss. As of yet, plaintiffs have not filed an opposition on the merits to the motion to dismiss, so this court cannot rule conclusively thereon.

Finally, defendants' conduct was not culpable. There appears to have been an oral agreement between plaintiffs and defendants wherein defendants would be allowed more time to file their answer. Plaintiffs said that they would sign a written version of the agreement if the terms were the same as those agreed to orally. Plaintiffs' only objection to the written agreement appears to be that it arrived after the deadline had passed for defendants to answer. It thus appears that there existed between plaintiffs and defendants an oral agreement allowing defendants extra time to answer the complaint, and that defendants reasonably relied upon such agreement, such that no culpable conduct on their part led to the default.

Because all three Falk factors for relief from default weigh in favor of granting such relief, plaintiffs' request for entry of

default is hereby DENIED.

IT IS SO ORDERED

DATED: May 1, 1996

/S/ WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE

FILED
July 11, 1997
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM ZISK and LOIS ZISK Plaintiffs, v. CITY OF ROSEVILLE, et al. Defendants.	No. Civ. S-95-2134 WBS/GGH ORDER

Defendant City of Roseville moves to dismiss Plaintiffs' sole remaining claim in this action for lack of jurisdiction. For reasons stated below, the motion is granted.

I.

BACKGROUND

Plaintiffs in propria persona filed this action on November 24, 1995, and amended their complaint on February 2, 1996. Judge

Garcia, who was initially assigned the case, recused himself on February 29, 1996. The Clerk of Court subsequently reassigned the case to Judge Shubb. Plaintiffs moved unsuccessfully to recuse Judge Shubb and to have default entered against Defendants. See Orders filed May 3, 1996.

Defendants then moved to dismiss the complaint, arguing Plaintiffs' claims were not ripe and that they failed to state a claim which would entitle them to relief. Fed. R. Civ. P. 12. On May 23, 1996, Judge Shubb rejected Defendants' argument that the Fifth Amendment taking claims were not ripe, but granted the motion to dismiss as to all but one claim on other grounds. He concluded by stating that

> [f]ollowing the entry of this order, the only cause of action of plaintiffs' first amended complaint that will remain is the § 1983 claim against the City of Roseville based upon damages caused by flooding of January 10, 1995. All other claims are DISMISSED WITHOUT PREJUDICE. Plaintiffs are granted ten (10) days from the date of this Order to file a second amended complaint consistent with this Order.

Plaintiffs did not amend the complaint within the time allotted by Judge Shubb. Instead, on

June 3, 1996, Plaintiffs moved for reconsideration of the May 23 order.

On June 7, 1996, Defendants filed a second motion to dismiss, this time arguing that the action should be dismissed because Plaintiffs violated Judge Shubb's May 23 order by failing to timely amend their complaint. At a status hearing on June 24, 1996, Plaintiffs again objected to Judge Shubb presiding over the case. Based on Plaintiffs' continued protestations, Judge Shubb recused himself. See Order filed June 26, 1996. The case was subsequently reassigned to the undersigned judge.

On July 2, 1996, Defendants renoticed their motion to dismiss on the undersigned judge's law and motion calendar, arguing that Plaintiffs violated Judge Shubb's May 23 order directing them to file an amended complaint within ten days. That motion was denied. See Order filed September 20, 1996. On August 26, 1996, Plaintiffs moved to vacate Judge Shubb's prior orders and "to enter judgment by default" against Defendants. Plaintiffs also moved for reconsideration of Judge Shubb's May 23 order. These motions were denied. See Orders filed September 20, 1996.

A Status (Pretrial Scheduling) Conference order was filed on September 20,

1996, confirming that "Plaintiffs' sole claim consists of a 42 U.S.C. § 1983 claim against the City of Roseville based upon damages caused by flooding on January 10, 1995," and granting Plaintiffs "ten (10) days from the date this order is filed to amend their complaint to cure the defects identified in Judge Shubb's order filed May 23, 1996. . . ." Plaintiffs were cautioned that "[a]fter that date, no further amendments to pleadings is permitted except with leave of court, good cause having been shown."

On September 27, 1996, Plaintiffs filed an ex parte motion seeking an extension of time for compliance with the deadlines in the scheduling order so that they could move for reconsideration of this Court's orders (1) denying their previous motion for reconsideration of Judge Shubb's order denying their request for entry of default against Defendants, and (2) denying their motion to vacate Judge Shubb's prior orders in this case. Plaintiffs filed their motion for reconsideration on these grounds on September 30, 1996. Both motions were denied. See Orders filed October 4, 1996, and October 23, 1996.

On January 21, 1997, Plaintiffs again moved for entry of default judgment against Defendants. The motion was denied and

Plaintiffs were warned not to bring another motion for default judgment based on Defendants' purported failure to respond to the complaint. See Status Conference Hearing, February 18, 1997.

On March 18, 1997, the City of Roseville filed the present motion, in essence, seeking reconsideration of Judge Shubb's May 23 ruling that the remaining damage claim is ripe. On April 18, 1997, Plaintiffs again moved for default judgment against Defendants, notwithstanding the Court's prior admonition.

II.

ANALYSIS

The City of Roseville argues that Plaintiffs' Fifth Amendment claim for damages caused to their property by flooding on January 10, 1995, is not ripe. Plaintiffs do not oppose the substantive basis of the motion. Instead, they continue to assert that the City of Roseville lacks standing to bring the instant motion because they are in default, a meritless argument that has been raised successfully numerous times in this litigation and will not be considered again. School Dist. No. 1J, Multnomah County v. ACandS Inc., 5 F.3d 1255, 1263 (9th Cir.

1993).

In Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194-95 (1985), the Supreme Court stated that before a taking claim can be filed in federal court against a state or local government, the plaintiff must "seek compensation through the procedures the State has provided for doing so." Plaintiffs "failure to seek compensation [through available state procedures and] in state court renders the taking claim unripe, and lack of ripeness deprives the court of subject matter jurisdiction." Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1404 (9th Cir. 1989), cert. denied, 494 U.S. 1016 (1990); see also Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1453 (9th Cir.) (a landowner must affirmatively seek compensation from the state if adequate procedures are available), modified on other grounds, 830 F.2d 968 (9th Cir. 1987), cert denied, 484 U.S. 1043 (1988). A landowner who seeks to sue in federal court before seeking compensation from the state "bears the heavy burden of establishing that state remedies are inadequate." Del Monte Dunes v City of Monterey, 920 F.2d 1496, 1507 (9th Cir. 1990). "A landowner fails to discharge this burden by showing that state

procedures are untested or uncertain." Id.; see Bateson v. Geisse, 857 F.2d 1300, 1306 (9th Cir. 1988) ("Until the state courts establish that [the landowner] may not obtain just compensation through an inverse condemnation action under any circumstances, [the state] procedures are adequate. . . .") "[T]he appropriate point for determining the adequacy of state compensation procedures is at the time the alleged taking occurs." Sinaloa, 882 F.2d at 1402.

Plaintiffs' property was purportedly damaged by flooding in January 1995, which they allege constituted an unconstitutional taking under the Fifth Amendment. However, they failed to demonstrate that they have exhausted state procedures or that state remedies were inadequate as of January 1995. Since California law has long provided damage remedy for the type of taking claim asserted by Plaintiffs against the City of Roseville, Plaintiffs' claim is not ripe and this Court lacks subject matter jurisdiction over the same. Sinaloa, 882 F.2d at 1402.

III.

CONCLUSION

For the aforementioned reasons, the City of Roseville's motion to dismiss

Plaintiffs' sole remaining claim for lack of subject matter jurisdiction is GRANTED. Plaintiffs' motion for default judgment is DENIED. Since all other defendants and claims have been dismissed, see Order filed May 23, 1996, or resolved, see Status (Pretrial Conference) Scheduling Order filed September 20, 1996, the clerk of Court is directed to close this action.

IT IS SO ORDERED.

Dated: July 10, 1997.

UNITED STATES DISTRICT JUDGE
/S/ GARLAND E. BURRELL, JR.

United States District Court
for the
Eastern District of California

* * CERTIFICATE OF SERVICE * *

2:95-CV-02134

Zisk

v.

City of Roseville

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on September 20, 1996, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies into an inter-office delivery receptacle located in the Clerk's office.

William J. Zisk
SF/GEB
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Roseville, CA 95678

Lois E. Zisk
205 Thomas Street
Roseville, CA 95678

Terence John Cassidy
Porter Scott Weiberg Delehant
Post Office Box 255428
350 University Avenue
Suite 200
Sacramento, CA 95865

FILED
September 20, 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM ZISK and LOIS ZISK

Plaintiffs,

v.

CITY OF ROSEVILLE, et al.

Defendants.

No. Civ. S-95-2134 WBS/GGH

ORDER

Plaintiff in propria persona filed this action on November 24, 1995, and amended their complaint on February 2, 1996. Judge Garcia, who was initially assigned to the case, recused himself on February 29, 1996. The Clerk of Court subsequently reassigned the case to Judge Shubb.

In April 1996, Plaintiffs wrote the Clerk of the Court requesting that entry of default be entered against Defendants and that

Judge Shubb recuse himself because of his daughter's employment with the law firm representing Defendants. Judge Shubb denied both requests. See Orders filed May 3, 1996.

Defendants moved to dismiss Plaintiffs' complaint, arguing they failed to state a claim which would entitle them to relief. Fed.R. Civ.P. 12(b)(6). On May 23, 1996, Judge Shubb granted in part and denied in part Defendants' motion, holding that

> [f]ollowing the entry of this order, the only cause of action of plaintiffs' first amended complaint that will remain is the § 1983 claim against the City of Roseville based upon damages caused by flooding of January 10, 1995. All other claims are DISMISSED WITHOUT PREJUDICE. Plaintiffs are granted ten (10) days from the date of this Order to file a second amended complaint consistent with this Order.

Plaintiffs did not amend the complaint within the time allotted by Judge Shubb. Instead, on June 3, 1996, Plaintiffs moved for reconsideration of the May 23, 1996, order.

On June 7, 1996, Defendants filed a second motion to dismiss, this time arguing that the complaint should be dismissed because Plaintiffs violated Judge Shubb's May 23, 1996, order by failing to timely amend their complaint. At a status hearing on June 24,

1996, Plaintiffs against objected to Judge Shubb presiding over the case. Based on Plaintiffs' continued protestations, Judge Shubb recused himself. See Order filed June 26, 1996. The case was subsequently reassigned to the undersigned judge.

On July 2, 1996, Defendants renoticed their motion to dismiss on the undersigned judge's law and motion calendar. L.R. 230. On August 26, 1996, Plaintiffs moved to vacate Judge Shubb's prior orders and "to enter judgment by default" against defendants. Also pending is Plaintiffs' motion for reconsideration of Judge Shubb's May 23, 1996, order.

II.

ANALYSIS

A.

PLAINTIFFS' MOTION TO VACATE ORDERS

Plaintiffs seek to vacate prior orders in this action based on their contention that Judge Shubb's order of recusal is evidence that this May 3, 1996, order denying their request that he recuse himself was erroneous. Plaintiffs are mistaken. The mere fact that Judge Shubb chose to recuse himself because of Plaintiffs' continued accusations of partiality does not demonstrate

that his recusal was required under 28 U.S.C. §455. Further, there is nothing in the record to suggest that Judge Shubb intended to vacate orders entered prior to his recusal. Accordingly, Plaintiffs' motion to vacate Judge Shubb's orders is denied.[2]

B.

DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss Plaintiffs' complaint pursuant to Fed.R.Civ.P. 41(b)[3], arguing that Plaintiffs' violated Judge

---

Plaintiffs' motions to enter default against Defendants and for reconsideration of Judge Shubb's previous order denying their request for entry of default are also denied. Absent highly unusual circumstances, reconsideration is appropriate only where the court is presented with newly-discovered evidence, is shown to have committed clear error or that the initial decision was manifestly unjust, or that there has been an intervening change in controlling law. School Dist. No. 1J, Multnomah County v. AcandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). Plaintiffs failed to demonstrate that any of these grounds for reconsideration exist.

Federal Rule of Civil Procedure 41 states, in relevant part, that "[f]or failure of plaintiff to . . .comply with . . .any order of court, a defendant may move for dismissal of any action or any claim against him. . . ."

Shubb's May 23, 1996, order directing them to file an amended complaint within ten days. See Order filed May 23, 1996. Plaintiffs counter the motion by continuing to argue that Defendants are in default and, therefore, cannot bring a motion to dismiss. Defendants' motion is denied since Plaintiffs' failure to amend certain claims does not necessarily establish a violation of Judge Shubb's order.

III.

CONCLUSION

For the aforementioned reasons, (1) Plaintiffs' motions to vacate orders entered by Judge Shubb prior to his recusal, for entry of default against Defendants, and for reconsideration of Judge Shubb's order denying entry of default against

Defendants are DENIED, and (2) Defendants' motion to dismiss is DENIED.

IT IS SO ORDERED.

Dated: September 19, 1996

/S/ GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

United States District Court
for the
Eastern District of California
* * CERTIFICATE OF SERVICE * *

2:95-CV-02134

Zisk

v.

City of Roseville

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on September 20, 1996, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies into an inter-office delivery receptacle located in the Clerk's office.

William J. Zisk
205 Thomas Street
Roseville, CA 95678

SF/GEB

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Sacramento, CA 95865

FILED
October 23, 1996

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM ZISK and LOIS ZISK	No. Civ. S-95-2134 WBS/GGH
Plaintiffs,	ORDER
v.	
CITY OF ROSEVILLE, et al.	
Defendants.	

Plaintiffs in propria persona move for reconsideration of this Court's order denying their motion to (1) vacate Judge Shubb's prior orders, and (2) reconsider Judge Shubb's order denying their request for entry of default. Reconsideration is generally appropriate only where the court is presented with newly-discovered evidence, is shown to have committed clear error or that the initial decision was manifestly unjust, or that there

has been an intervening change in controlling law. School Dist. No. 1J, Multnomah County v. AcandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993) Plaintiffs failed to demonstrate that any of these grounds for reconsideration exist; therefore, their motion for reconsideration is DENIED.

No further motions for reconsideration or motions for clarification or modification of this order shall be filed or entertained.

IT IS SO ORDERED.

Dated: October 21, 1996

/S/ GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

Law Offices Of
Porter, Scott, Weiberg & Delehant
A Professional Corporation
350 University Avenue, Suite 200
Post Office Box 255428
Sacramento, California 95865
(916) 929-1481

Terence J. Cassidy - SBN: 99180
Kristin M. Engstrom - SBN: 186103
{0036-0128}

ATTORNEYS FOR: Defendant CITY OF ROSEVILLE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FILED
March 10, 1997
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

WILLIAM ZISK and LOIS ZISK Plaintiffs, v. CITY OF ROSEVILLE, et al. Defendants. _____/	No. Civ. S-95-2134 WBS/GGH MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF KRISTIN M. ENGSTROM IN SUPPORT THEREOF DATE: May 5, 1997 TIME: 9:00 a.m. CTRM: 6

Defendant CITY OF ROSEVILLE hereby moves to dismiss this case and submits the following points and authorities in support of

this motion.

I

STATEMENT OF FACTS

Plaintiff filed the Complaint giving rise to the instant action on November 24, 1995. By amended Complaint, filed February 2, 1996, plaintiffs WILLIAM J. ZISK and LOIS E. ZISK asserted causes of action of alleged violation of the Fifth and Fourteenth Amendment, 42 U.S.C. §§ 1983 and 1985, and supplemental state law claims for fraud and recision. These claims allegedly arose from ordinances passed by the CITY OF ROSEVILLE between 1967 and 1991, and flooding, which occurred in 1986 and in 1995. On May 23, 1996, the Court dismissed all claims against all individually named defendants, and all claims, save and except a claim under 42 U.S.C § 1983 for inverse condemnation, based upon damages allegedly caused by flooding on January 10, 1995, against defendant CITY OF ROSEVILLE.

The Court's ruling on May 23, 1996, was pursuant to defendant's motion to dismiss for lack of subject matter jurisdiction filed on April 22, 1996. The Court ruled that plaintiffs' claims based on a regulatory taking, while properly raised in federal

court, were barred by the statute of limitations. Plaintiffs' only remaining claim was for inverse condemnation for the 1995 flood. However, the Court failed to analyze the propriety of plaintiffs' physical invasion taking claim in federal court when plaintiffs had failed to seek compensation in state court.

Upon review, defendant continues to assert that the federal court lacks subject matter jurisdiction over plaintiffs' claim for damages resulting from the January 10, 1995 flood of plaintiffs' property, as plaintiffs have yet to seek compensation in state court.

By this motion, defendant seeks to dismiss plaintiffs' claim based on the lack of subject matter jurisdiction.

II

THE MOTION TO DISMISS SHOULD BE GRANTED AS THE COURT LACKS SUBJECT MATTER JURISDICTION

The defense of lack of subject matter jurisdiction cannot be waived. Generally, "the court is under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction." Augustine v. U.S., 704 F.2d 1074, 1077 (9th Cir. 1983); Fed.R.Civ.P. 12(h)(3).

Defendant respectfully submits that

the Court should dismiss plaintiffs' claims because there is a lack of subject matter jurisdiction.

In Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985), the Supreme Court crafted a two-prong inquiry to determine the subject matter jurisdiction of a taking claim against states or their political subdivisions in federal court. First,

> "...a claim that the application of government regulations affects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id* at 186.

Next, plaintiffs are required to seek compensation through the procedures the State has provided before turning to the federal courts. *Id*. at 194-195. In cases of physical invasion, rather than a regulatory taking, Williamson's final decision requirement is inapplicable as the physical taking is, by definition, a final decision. Sinaloa Lake Owners' Association v. City of Simi Valley, 882 F.2d 1398, 1402 (9th Cir. 1989). Therefore, before an action for a physical invasion taking can be brought in an action

against a State government or one of its political subdivisions in federal court, compensation must first be sought from the State if adequate procedures are available. *Id.* at 1402.

"Physical occupation cases are those where the government physically intrudes upon private property, either directly or by authorizing others to do so." Hall v. City of Santa Barbara, 833 F.2d 1270, 1275 (9th Cir. 1986). *See also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Flood cases involve a permanent physical occupation. Hall, *supra* at n.10.

California law has long provided a damage remedy for takings affected by direct governmental action. Sinaloa, *supra*, at 1402. *See also* Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal.3d 862, 866-67(1985); Holtz v. San Francisco Bay Area Rapid Transit District, 17 Cal.3d 648, 652 (1976). Thus, a case is not ripe for adjudication until compensation is sought in the state court. Sinaloa, *supra* at 1403-04. Indeed, the federal court lacks subject matter jurisdiction until compensation is sought and

refused in state court. Id. [4]

Here, plaintiffs' only remaining cause of action is for damage allegedly caused by the physical invasion of flood waters onto plaintiffs' property on January 10, 1995. As plaintiffs have not sought compensation in the state court, and there are no allegations or evidence that attempting to do so would be futile, plaintiffs' claim is not ripe for adjudication in this Court, and therefore subject matter jurisdiction is lacking. Accordingly, defendant respectfully submits that its motion to dismiss for lack of subject matter jurisdiction be granted.

IV

CONCLUSION

For the reasons so stated above, defendant respectfully submits that its motion to dismiss for lack of subject matter jurisdiction be granted.

DATED: March 17, 1999

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[4] The Federal Court will also have jurisdiction if seeking compensation in State Court is determined to be futile. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 196-197 (1985).

Respectfully submitted,
PORTER, SCOTT, WEIBERG & DELEHANT
A Professional Corporation

By: /S/
Terence J. Cassidy
Kristin M. Engstrom

Zisk v. City of Roseville, et al.
USDC Case No. CIV S-95-2134 GEB/GGH

DECLARATION OF SERVICE

I am a citizen of the United States and a resident of Sacramento County, California. I am over the age of eighteen years and not a party to the within above-entitled action. My business address is P.O. Box 255428, 350 University Avenue, Suite 200, Sacramento, California 95865.
On this date I served:

MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF KRISTIN M. ENGSTROM IN SUPPORT THEREOF

[XX] By placing a true copy, enclosed in a sealed envelope, for collection and mailing on this date at the business address shown above following our ordinary business practices. I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that a sealed envelope is placed for

collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid to each party listed below as follows:

[ ] By faxing a true copy to each party listed below listed as follows:

William J. Zisk
205 Thomas Street
Roseville, CA 95678

Lois E. Zisk
205 Thomas Street
Roseville, CA 95678

I declare under penalty of perjury that the foregoing is true and correct.
Executed on March 18, 1997, at Sacramento, California.

/S/
PATRICIA A. SULLY

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

FILED
July 11, 1997

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

William Zisk and Lois Zisk

v.

No. CIV S 95 2134 GEB GGH

City of Roseville

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF JULY 11, 1997.

Jack L. Wagner,
Clerk of the Court

ENTERED: July 11, 1997

by: _____

B.Bryant, Deputy Clerk

United States District Court
Eastern District of California
July 11, 1997

**CERTIFICATE OF SERVICE **

2:95-cv-02134

Zisk

v.

City of Roseville

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

July 11, 1997, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope to the person(s) hereinafter listed, by depositing said in the U.S. Mail, or by placing said copy(ies) into an inter-office receptacle located in the Clerk's office.

William J Zisk SF/GEB
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Lois E Zisk
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Kristin Engstrom
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Post Office Box 255428
350 University Avenue
Suite 200 Sacramento, CA 95865

Jack L. Wagner, Clerk

_____
By: Deputy Clerk

FILED

SEP 11 1997

CLERK, U.S. DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BY_____

DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM ZISK and LOIS ZISK	No. Civ. S-95-2134 WBS/GGH
Plaintiffs,	ORDER
v.	
CITY OF ROSEVILLE, et al.	
Defendants.	
_____/	

Plaintiffs' motion for a new trial filed July 21, 1997, is DENIED.

IT IS SO ORDERED.

DATED: September 9, 1997

/S/
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

---

* This case was determined to be suitable for decision without oral argument. L.R.230(h).

United States District Court
for the
Eastern District of California
December 10, 1997

* * CERTIFICATE OF SERVICE * *
2:95-cv-02134

Zisk

v.

City of Roseville

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 10, 1997, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said

copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

GEB

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Roseville, CA 95678

Lois E. Zisk
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Terence John Cassidy
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Sacramento, CA 95865

Kristin Engstrom
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PO Box 255428
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Suite 200
Sacramento, CA 95865

Jack L. Wagner, Clerk

_____

By: Deputy Clerk

FILED
December 10, 1997

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM ZISK and LOIS ZISK,	CIV. S-95-2134 GEB GGH
Plaintiffs,	ORDER*
vs.	
CITY OF ROSEVILLE, et al.,	
Defendants.	

Plaintiffs *in propria persona* filed a "Motion for Revision of: Judgment in a Civil Case, Alternatively for: Relief from: Order filed September 11, 1997." The motion is DENIED.

No motion for reconsideration, modification, or clarification of this order shall be filed or entertained.

IT IS SO ORDERED.

Dated: December 5, 1997

/s/
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

---

*This case was determined to be suitable for decision without oral argument. L.R. 78-230(h).

WILLIAM J. ZISK
LOIS E. ZISK
205 Thomas Street
Roseville, CA 95678
Telephone: (916) 782-2233
Telecopier: (916) 783-3408

Plaintiff in Pro Per

FILED
October 10, 1997
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM J. ZISK and LOIS E. ZISK,

Plaintiffs

vs.

CITY OF ROSEVILLE, CALIFORNIA, et al,

Defendants

_____/

No. CIV-S-95 2134 GEB/GGH

NOTICE OF APPEAL F.R.A.P., Rule 4(a).(4)

TO THE CLERK OF THE ABOVE ENTITLED COURT:

Pursuant to the provisions of Federal Rules of Civil Procedure, Rules 54(b), 58, and 79(a), plaintiffs hereby submit the following NOTICE OF APPEAL from the purported Judgment in A Civil Case, filed on July 11, 1997 and apparently not being docketed. Plaintiffs do not waive the requirements of the separate document requirement specified in Rule 58, for purposes of a final appealable Judgment. see Bankers Trust Co. v Mallis 435 U.S. 381, 98 S.Ct. 1117, 55 Led 2d 357 (1978). On October 9, 1997, plaintiffs served and filed a separate Notice of Motion and Motion on this issue, being set for hearing on December 1, 1997. Plaintiffs' hereby incorporate by reference plaintiffs' said Notice and Motion herein.

NOTICE IS HEREBY GIVEN that, William J. Zisk and Lois E. Zisk, plaintiffs in the above named case, hereby jointly appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment filed herein on July 11, 1997, including but not limited to all orders of the court of any kind or nature issued in this action since it's commencement through and including the September 11, 1997

filed Order denying plaintiffs' Noticed Motion for New Trial filed July 21, 1997.

Dated: October 10, 1997

/S/ _____
Lois E. Zisk

/S/ _____
William J. Zisk

(3)

Supreme Court, U.S.
FILED
MAR 29 1999
CLERK

No. 98-1310

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

WILLIAM J. ZISK AND LOIS E. ZISK
Petitioners

vs.

CITY OF ROSEVILLE; JUNE WANISH; GEORGE A BULJAN; RICHARD ROCCUCCI; THOMAS CHAMBLISS; JOHN M. BYOUK; MEL HAMEL; WILLIAM SANTUCCI; PAULINE ROCCUCCI; HARRY CRABB, JR; MICHAEL F. DEAN; STEVEN BRUCKMAN; G. RICHARD BROWN; FREDERICK L. BARNETT; MARTHA RILEY,
Respondent(s)

On Petition For Writ Of Certiorari To
United States Court Of Appeals
For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

WILLIAM J. ZISK AND LOIS E. ZISK
205 Thomas Street
Roseville, California 95678-1858
Telephone (916) 782-2233
Telecopier (916) 783-3408

In Propria Persona

3988

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court ought to issue an order granting certiorari, vacating the judgment below without determination of the merits and remanding to entry of default judgment for the relief demanded in petitioners' verified amended complaint, where (a) intervening factors have arisen that have a legal bearing on the decision, (b) clarification of the opinion below is needed to assure the jurisdiction of the Court of Appeal, (c) clarification of the factor the judgment below was in error, (d) clarification of the factor that entry of default judgment on the merits for the relief demanded in petitioners' complaint is appropriately in order.

2. Whether petitioners have been deprived of a constitutionally protectible property interest for an improper motive and by means that were pretexual, arbitrary and capricious and without any rational basis and without substantive procedural due process and just compensation.

3. Whether District Court Chief Judge William A. Shubb, with daughter employed as attorney in respondent counsels' law firm, violated the mandates of Title 28 U.S.C.A. § 455(a) (b)(1)(5)(ii)(iii) and exceeded jurisdiction with summary dismissal of petitioners' verified amended civil complaint prior to his recusal.

4. Whether District Court refusal to enter default for failure to plead or otherwise respond to petitioners' complaint within required time period denied petitioners equal treatment and due process requirement of opportunity to be heard.

5. Whether non-compliance of the mandates of Federal Rules of Civil Procedures Rule 58 and Rule 79(b) starts the time to run for notice of appeal.

6. Whether respondent former city attorney has deprived petitioners impartial procedural due process, equal treatment and just compensation while acting in triple capacity - first as respondent city attorney in denial of petitioners qualified application for a building permit - secondly, as state superior court judge presiding over respondents abusive eminent domain proceedings - thirdly, as justice of state court of appeals deciding related actions.

7. Whether lower state court judges deemed disqualified have jurisdiction to deprive petitioners of procedural due process, just compensation and equal treatment with summary dismissal of petitioners' verified civil complaint.

8. Whether a public entity may conspire to take private property for public use by fraudulent land use zoning and abusive eminent domain powers without procedural due process, equal treatment and just compensation.

9. Whether published lower state court appellate opinion, Placer County Superior Court No. 41105, Zisk v. City of Roseville et. al., 56 C.A. 3d 41; 127 Cal. Rptr. 896; Civ. No. 15121 Third Dist. Feb. 20, 1976 should be reviewed by the United States Supreme Court for "plain error" and reversed.

10. Whether lower state court eminent domain proceeding, Placer County, California Superior Court No. 41104, City of Roseville v. William J. Zisk and Lois E. Zisk, November, 1977, should be reviewed by the United States Supreme Court for "plain error"; annulled and rescission granted with the relief demanded in United States District Court for the Eastern District of California, case[s] Number[s] Civ-S-95-02134 GEB/GGH, William J. Zisk and Lois E. Zisk v. City of Roseville et. al., and Civ-S-97-0426 GEB/GGH, William J. Zisk and Lois E. Zisk v. City of Roseville, California et. al.; Ninth Circuit Court of Appeals Number[s] 97-17048 and 98-16722, respectively.

11. Whether petitioners have been denied the constitutional right to a jury trial with the amount in excess of twenty dollars in controversy.

12. Whether petitioners' private property was seized and searched without writ or warrant nor supported by probable cause.

13. Whether respondents are in default and lack standing in the proceedings.

I. THE UNITED STATES SUPREME COURT HAS JURISDICTION

Respondents' claim that this court does not have jurisdiction of this petition is erroneous. This court has jurisdiction pursuant to petitioners' statement of jurisdiction. See petitioners Petition for Writ of Certiorari at 1. Petitioners exhausted their state court remedies on the issues raised by this petition.

Petitioners petitioned for Rehearing to the state appellate court. Petition for Rehearing was denied on January 17,1996 (R.B. App. 7).

Petitioners brought a Petition for Review in the California Supreme Court on the issues raised in Petitioners Statement of the Case. See petitioners' Petition for Writ of Certiorari at 3-22. The California Supreme Court denied review on March 20, 1996 (R.B. App. 11).

The jurisdiction of the United States Supreme Court does not depend on whether the state court addressed the federal questions. It is enough that the federal claims were made and not accepted. *(Lynk v. La Porte Superior Court No. 2*, 789 F.2d 554 (7th Cir. 1986). Furthermore, when the California Supreme Court denies a Petition for Review, it is to be assumed that the court has been given fair opportunity to review the merits of the petitioners' claim, for purposes of exhaustion of state court remedies (*Roman v. Estelle*, 917 F.2d 1505 (9th Cir. 1990). The issues have been raised, preserved, and passed upon by the California Supreme Court.

II. Respondents' cite of *Weinberger v. Equifax*, 555 F 2d 456 (5th Cir. 1977) is erroneous and misplaced.

In reviewing respondents Brief in Opposition to Petition for Writ of Certiorari at page 12, petitioners were unable to locate the case as cited above, holding that 28 U S.C. § 455 does not mandate recusal of a judge on the basis of family relationship where the family member does not actively represent a party in that case.

Respondents have acknowledged that Judge Shubb's daughter, Carrisa A. Shubb was an associate attorney at Porter, Scott, Weiberg & Delehant, the law firm representing respondents from August 2, 1993 to November 8, 1996 and was an associate during the period when her father, the Honorable William B. Shubb, acted as the judge in this case. Upon learning of the father/daughter association, petitioners immediately forwarded objections to the district court on April 25,1996 (R.B. App. 17), before Judge Shubb made any rulings in the case. The letter in relevant part concluded with:

> . . . Also, I/We are informed that the Honorable William B. Shubb has a daughter in the law firm involved. I/We are besides ourselves that the law firm of Porter, Scott, Weiberg & Delehant chose to represent the defendants and then to be allowed to get a judge of this Honorable Eastern District Court in place to make any ruling ultimately benefiting his daughter's relationship and therefore enhance her standing in the law firm. I/We respectfully object to the Honorable William B. Shubb, because of the potential for the appearance of bias and obligations that grow out of the strong bond of the father/daughter relationship at issue.

III. REVIEW IS WARRANTED BECAUSE RESPONDENTS ARE IN DEFAULT, HAVE NOT BEEN RELIEVED OF DEFAULT, ARE STILL IN DEFAULT AND LACK STANDING IN THIS PROCEEDING

The complaint in this action was timely filed on November 24, 1995 and amended on February 2, 1996. Service of Summons was completed on February 6, 7, 8, 1996, pursuant to F.R.C.P. Rule 4(e)(1).

Unless a different time is prescribed in a statute of the United States, a respondant shall serve an answer within 20 days after being served with the summons and complaint. Federal Rules of Civil Procedure Rule 12(a)(1)(A).

Absolutely no written response whatsoever was received by petitioners or the Clerk of the Court during the 20 days that followed the Service of Summons. The record is devoid of any written request to petitioners or the Court during the 20 days following Service of Summons, requesting an extension of time to answer, pursuant to L.R.142 of the District Court, Eastern District of California. As evidence of no response, whatsoever, see copy of docket dated March 8, 1996, (see R.B. App. 13 - 16).

Respondents are in default and lack standing. Petitioners have objected to the lack of standing of the respondents from the outset of this proceeding and continue to object to the standing of respondents, being in default. Respondents have not been relieved of default and are still in default.

Courts conduct prudential standing analysis only after Article III standing has been established. U.S.C.A. Const. Art. 3, § 1 et seq.

Article III § 2 of the United States Constitution confines the Federal Courts to adjudicating actual cases and controversies In interpreting that restriction, Federal Courts have developed, among others, the doctrine of standing. See *Allen v. Wright* 468 U.S. 737, 750, 104 S. Ct. 3351, 3324, 82 L.Ed. 2d 556 (1984).

Standing does not focus on the merits but is preliminary jurisdictional requirement necessary to establish that a litigant is entitled to judicial action. The standing inquiry focuses on whether the litigant is entitled to have the Court decide the merits of the dispute of particular issues. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205, 45 L.Ed. 2d 343 (1975).

When standing is challenged on the basis of pleadings, the Court accepts as true all material allegations of the complaint and construes the complaint in favor of the complaining party *Pennell v. City of San Jose*, 485 U.S. 1, 7, 108 S. Ct. 849, 855, 99 L.Ed. 2d 1 (1988).

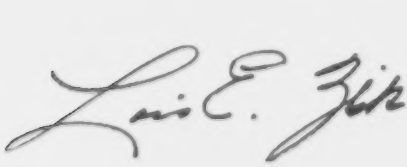
CONCLUSION

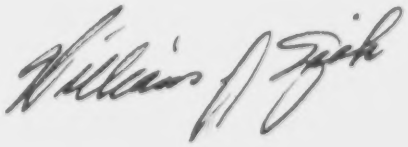
Respondants have avoided any response to the major issues presented for review. In fact, some of the respondants did not respond at all.

Petitioners have received absolutely no response or explantion for the thirty-two (32) year history of this litigation which has been spawned by respondants' deceptive and fraudulent actions so long ago.

Petitioners respectfully request this Honorable Supreme Court consider petitioners reasons for granting Writ of Certiorari.

Respectfully submitted,





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Telephone No (916) 782-2233
Petitioner Pro se

William J. Zisk
205 Thomas Street
Roseville, California, 95678-1858
Telephone No (916) 782-2233
Petitioner Pro se

March 26, 1999

No. 98-1310

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

WILLIAM J. ZISK AND LOIS E. ZISK
Petitioners

vs.

CITY OF ROSEVILLE; JUNE WANISH; GEORGE A BULJAN; RICHARD ROCCUCCI; THOMAS CHAMBLISS; JOHN M. BYOUK; MEL HAMEL; WILLIAM SANTUCCI; PAULINE ROCCUCCI; HARRY CRABB, JR; MICHAEL F. DEAN; STEVEN BRUCKMAN; G. RICHARD BROWN; FREDERICK L. BARNETT; MARTHA RILEY,
Respondent(s)

On Petition For Writ Of Certiorari To
United States Court Of Appeals
For The Ninth Circuit

APPENDIX TO REPLY TO BRIEF IN OPPSITION TO

PETITION FOR WRIT OF CERTIORARI

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IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

F I L ED
FEB - 2 1995
COURT OF APPEAL-THIRD DISTRICT
ROBERT L. LISTON, Clerk
BY_____Deputy

WILLIAM J. ZISK & LOIS E. ZISK
Petitioner

vs.

3 Civil C020119
Placer S-1495

SUPERIOR COURT, PLACER COUNTY
Respondent
CITY OF ROSEVILLE
Real Party In Interest

By the Court:

The petition for writ of mandate with request for stay is denied. (See Rule 56 California Rules of Court); (See Sherwood v. Superior Court (1979) 24 Cal.3d 183.)

Dated: February 2, 1995

PUGLIA, P.J.

---

cc: See Mailing List

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

MAILING LIST

Re: WILLIAM J. ZISK & LOIS E. ZISK vs.
SUPERIOR COURT, PLACER COUNTY
3 Civil C020119

Copies of the attached document have been sent to the individuals checked below:

WILLIAM J. ZISK
23S Thomas Street
Roseville, CA 95678

LOIS E. ZISK
205 Thomas Street
Roseville, CA 95678

LAW OFFICE OF
MCDONOUGH HOLLAND & ALLEN
MARCIA L. AUGSBERGER
555 Capitol Mall
9th Floor
Sacramento, CA 95814

PLACER COUNTY SUPERIOR COURT CLERK
101 Maple Street
Auburn, CA 95603

Third Appellate District No . C020119
S044898

IN THE SUPREME COURT OF CALIFORNIA
SUPREME COURT

WILLIAM J. ZISK Et A1., Petitioners

SUPREME COURT
FILED
APR 12 1995
Robert Wandruff Clerk
Signed
DEPUTY

v.

SUPERIOR COURT PLACER COUNTY, Respondent
CITY OF ROSEVILLE, Real Party In Interest

Petition for review DENIED.

Signed
Chief Justice

F I L ED
DEC 21 1995
COURT OF APPEAL-THIRD DISTRICT
ROBERT L. LISTON,
BY_____
Deputy Clerk

NOT TO BE PUBLISHED
COPY
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Placer)

WILLIAM J. ZISK AND LOIS E. ZISK, Plaintiffs and Appellants, v. CITY OF ROSEVILLE, Defendant and Respondent.	C020628 (Super. Ct. No. S-1495)

William and Lois Zisk appeal from a trial court order, granting the City of Roseville's motion to dismiss for lack of prosecution. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Zisks filed a complaint against the City in October 1991. The complaint was never served. Two days before the expiration of the three-year time period for service of summons set forth in Code of Civil Procedure section 583.410, the Zisks served the City with a first amended complaint. The City filed a motion to dismiss for lack of prosecution.

The Zisks then filed a statement of disqualification pursuant to Code of Civil Procedure section 170.1 against Judge James L. Roeder. Within 10 days, Judge Roeder ordered the statements of objection and disqualification stricken pursuant to Code of Civil Procedure section 170.4, subdivision (b). Thereafter, Judge Roeder granted the City's motion to dismiss.

DISCUSSION

On appeal the Zisks claim that Judge Roeder was disqualified as a matter of law when he granted the City's motion. The exclusive means of appellate review of an unsuccessful challenge to the trial court judge is by writ petition filed within 10 days of the trial court's order striking the statements of objection and disqualification. (Code Civ. Proc., § 170.3, subd. (d); *People v. Hull* (1991) 1 Cal.4th 266, 271.) Accordingly, they may not claim on appeal that the judge was not qualified to enter judgment. The Zisks make no other claim of error.

The judgment (order) is affirmed.

BLEASE, Acting P. J.

We concur:

SIMS, J.
BROWN, J.

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

MAILING LIST

Re: WILLIAM J. ZISK AND LOIS E. ZISK vs.
CITY OF ROSEVILLE
3 Civil C020628

Copies of the attached document have been sent to the individuals checked below:

WILLIAM J. ZISK
205 Thomas Street
Roseville, CA 95678

LOIS E. ZISK
205 Thomas Street
Roseville, CA 95678

LAW OFFICE OF
MCDONOUGH, HOLLAND & ALLEN
MARCIA L. AUGSBURGER
555 Capitol Mall
9th Floor
Sacramento, CA 95814

HONORABLE JAMES L ROEDER
JUDGE OF THE SUPERIOR COURT
PLACER COUNTY
101 Maple street
Auburn, CA 95603

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

F I L ED
JAN 17 1996
COURT OF APPEAL-THIRD DISTRICT
ROBERT L. LISTON,
BY_____
Deputy Clerk

WILLIAM J. ZISK & LOIS E. ZISK
Plaintiff and Appellant

vs.

3 Civil C020628
Placer S1495

CITY OF ROSEVILLE
Defendant and Respondent

By the Court:
Appellants' petition for rehearing is denied.

Dated: January 17, 1996

BLEASE, Acting P.J.

---

cc: See Mailing List

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

MAILING LIST

Re: WILLIAM J. ZISK & LOIS E. ZISK vs.
SUPERIOR COURT, PLACER COUNTY
3 Civil C020628

Copies of the attached document have been sent to the individuals checked below:

WILLIAM J. ZISK
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Roseville, CA 95678

LOIS E. ZISK
205 Thomas Street
Roseville, CA 95678

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MCDONOUGH HOLLAND & ALLEN
MARCIA L. AUGSBERGER
555 Capitol Mall
9th Floor
Sacramento, CA 95814

PLACER COUNTY SUPERIOR COURT CLERK
101 Maple Street
Auburn, CA 95603

CIVIL NO._____

SUPREME COURT
FILED
JAN 29 1996
Robert Wandruff Clerk

_____
DEPUTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

-----ooOoo-----

WILLIAM J. ZISK AND LOIS E. ZISK
Plaintiffs, Appellants

vs .

NO. 3 Civil C020628
Placer Sup. No. S-1495

CITY OF ROSEVILLE, CALIFORNIA, a municipal corporation and DOES 1-100, inclusive,
Defendants t Respondents

_____

-----ooOoo-----

PETITION FOR REVIEW

On Appeal From the Judgment of the Superior Court of the State of California, in and for the County of Placer

The Honorable James L. Roeder, Judge

William J. Zisk
Lois E. Zisk
205 Thomas Street
Roseville, CA 95678
Telephone: (916) 782-2233
Telecopier: (916) 783-3408

Appellants In Propria Persona

Court: SUPREME COURT OF THE STATE OF CALIFORNIA
Case Number: 3 Civil No C020628 Placer Superior Court No. S-1495
Case Name: Zisk v. City of Roseville et al

DECLARATION OF PERSONAL SERVICES

I am a citizen of the United States and employed in the County of Placer. I am over the age of eighteen (18) years and a party to the within above-entitled action. My business address is 205 Thomas Street, Roseville, California 95678.

On January 29, 1996, I served the following:

PETITION FOR REVIEW

XXX (by personally delivering a true copy thereof, in accordance with Code of Civil Procedure §1011, to the person(s) and at the address(es) set forth below.

SUPREME COURT (orig. & 13 copies)
900 N Street Fourth Floor
Sacramento, CA 95814-4869

COURT OF APPEAL (1 copy)
Third Appellate District
900 N Street, Fourth Floor
Sacramento, CA 95814-4869

MCDONOUGH, HOLLAND & ALLEN
A Professional Corporation
G. Richard Brown, Esq.(050203)
Marcia L. Augsburger, Esq. (145686)
555 Capitol Mall, 9th Floor
Sacramento, California 95814

CLERK (1 copy)
Placer County Superior Court
101 Maple Street, Room 401
Auburn, California 95603

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on January 29, 1996 at Roseville, California.

_____
William J. Zisk

Third Appellate District No. C020628
S051527

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
MAR 20 1996
Robert Wandruff Clerk

DEPUTY

WILLIAM J. AND LOIS E. ZISK Et A1., Appellants

v.

CITY 0F ROSEVILLE, Respondent

Appellants' petition for review DENIED.

Signed
Acting Chief Justice

William J, Zisk
and Lois E. Zisk
205 Thomas Street
Roseville, CA 95678
Telephone (916) 782-2233
Telecopier (916) 783-3408

ORIGINAL
FILED
APR 8 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____
DEPUTY CLERK

April 8, 1996

OFFICE OF THE CLERK
United States District Court
Eastern District of California
650 Capitol Mall, Room 2546
Sacramento, CA 95614
(916) 489-5415

Re: CASE NUMBER: CIV-S-95 2134 EJG GGH
WILLIAM J. ZISK AND LOIS E. ZISK V. CITY OF ROSEVILLE, et al

Subject: ENTRY OF DEFAULT
FEDERAL RULES OF CIVIL PROCEDURE, RULE 55(a),(b)(1)

Dear Clerk:

Pursuant to Federal Rules of Civil Procedure, Rule 55(a), (b)(1), I/We are writing you for your entry of default as against the defendants in this action. As you are aware, service of summons and Complaint was completed on February 6,7,8,1996 and each defendant has 20 days, or until February 26, 27, 28, 1996, respectively, at the latest, to serve and file an answer.

Please refer to your court docket of March 8, 1996, 12:13 p.m. (attached for ready reference). Please also note that there is no accompanying proof of service. There has not been any timely appearance and I/We do not want to waive our right to entry of default by directly recognizing the defaulting defendant [s].

Very truly yours,

_____
William J. Zisk

_____
Lois E. Zisk

WJZ/LEZ/lez
Attachments

EXHIBIT A

U.S. District Court REFER
EASTERN DISTRICT OF CALIFORNIA (Sacramento)
CIVIL DOCKET FOR CASE #: 95-CV-2134

Zisk, et al v. City of Roseville, et al — Filed: 11/24/95
Assigned to: Honorable William B Shubb — Jury demand: Plaintiff
Referred to: Magistrate Judge Gregory G Hollows
Demand: $0,000 — Nature of Suit: 440
Lead Docket: None — Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 42 : 1983 Civil Rights Act

WILLIAM J ZISK
plaintiff

William J Zisk
[COR LD NTC] [PRO SE]
205 Thomas Street
Roseville, CA 95678

LOIS E ZISK
plaintiff

Lois E Zisk
[COR LD NTC] [PRO SE]
205 Thomas Street
Roseville, CA 95678

v.

CITY OF ROSEVILLE
defendant

JUNE WANISH
defendant

GEORGE A BULJAN
defendant

MARTHA RILEY
defendant

RICHARD ROCCUCCI
defendant

THOMAS CHAMBLISS
defendant

I hereby certify that the
instrument is a true and correct copy of
the original on file in my office.
ATTEST: JACK L. WAGNER
Clerk U.S. District Court
Eastern District of California
By Signed
Deputy Clerk
Dated March 8, 1996

proceedings include all events. REF
2:95cv2134 Zisk, et al v . City of Roseville, et al

JOHN M BYOUK
defendant

MEL HAMEL
defendant

WILLIAM SANTUCCI
defendant

PAULINE ROCCUCCI
defendant

HARRY CRABB, JR
defendant

TITLE INSURANCE AND TRUST
COMPANY
defendant

Proceedings include all events.

2:95cv2134 Zisk, et al v. City of Roseville, et al REF

11/22/95 3	LETTER to court from plaintiffs informing court of filing (dmb) [Entry date 11/30/95]
11/24/95 1	COMPLAINT before Judge Edward J Garcia; referred to Magistrate Judge Gregory G Hollows; Summons issued; fee status paid; Receipt #169181; jury demand; Notice regarding Consent forms given (dmb) [Entry date 11/30/95]
11/24/95 2	ORDER setting scheduling conference for 9:30am on 3/15/96 before Judge Edward J Garcia (cc: all counsel) (dmb) [Entry date 11/30/95]
1/2/96 4	APPLICATION for order to extend time for service of process of the complaint by plta (ndd) [Entry date 01/03/96]
1/2/96 --	LODGED Order re Application to extend time for service of the complaint 4y plte (ndd) [Entry date 01/03/96]
1/4/96 5	ORDER by Judge Edward J. Garcia ORDERED that plts are granted an extension of 30 days for service of the complaint (cc: all counsel) (ndd)
2/2/96 6	AMENDED COMPLAINT [1-1] by plaintiffs William J Zisk and Lois E Zisk (gm) [Entry date 02/06/96]
2/9/96 7	RETURN OF SERVICE executed Steven Bruckman on 2/8/96 (gm) [entry date 02/13/96]
2/9/96 8	RETURN OF SERVICE executed Frederick L Barnett on 2/6/96 (gm) [Entry date 02/13/96]
2/9/96 9	RETURN OF SERVICE executed upon defendant George A Buljan on 2/8/96 (gm) [Entry date 02/13/96]
2/9/96 10	RETURN OF SERVICE executed upon defendant Martha Riley on 2/8/96 (gm) [Entry date 02/13/96]
2/9/96 11	RETURN OF SERVICE executed upon defendant William Santucci on 2/8/96 (gm) [Entry date 02/13/96)
2/9/96 12	RETURN OF SERVICE executed upon defendant Richard Roccucci on 2/8/96 (gm) (Entry date 02/13/96)
2/9/96 13	RETURN OF SERVICE executed upon defendant Pauline Roccucci on 2/8/96 (gm) [Entry date 02/13/96]
2/9/96 14	RETURN OF SERVICE executed upon defendant Mel Hamel on 2/8/96 (gm) [Entry date 02/13/96]
2/9/9S 15	RETURN OF SERVICE executed upon defendant Harry Crabb Jr on 2/8/96 (gm) [Entry date 02/13/96]
2/9/96 16	RETURN OF SERVICE executed on defendant G Richard Brown on 2/8/96 (gm) [Entry date 02/13/96]

2/9/96 17	RETURN OF SERVICE executed upon defendant John M Byouk on 2/8/96 (gm) [Entry date 02/13/96]
2/9/96 18	RETURN OF SERVICE executed upon defendant Thomas Chambliss on 2/8/96 (gm) [Entry date 02/13/96]
2/29/96 19	RECUSAL ORDER by Honorable Lawrence K. Karlton IT IS HEREBE ORDERED that the Judge Edward J Garcia recuses himself as the judge to whom this case is assigned; The Clerk of the Court shall reassign this case to another judge for all further proceedings, making the appropriate adjustments in the assignments of civil cases to compensate for such reassignment; Case reassigned to Honorable William B. Shubb; AND any dates previously set in this case are hereby VACATED; the parties are referred to the attached Order Setting Status Conference (cc: all counsel) (gk)
2/29/96	ORDER setting scheduling conference for 10:30 on 6/24/96 before Honorable William B. Shubb (cc: all counsel) (gk)

William J. Zisk
and Lois E. Zisk
Roseville, CA 95678
Telephone (916) 782-2233
Telecopier (916) 783-3408

ORIGINAL
FILED
APR 25 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____
DEPUTY CLERK

April 24, 1996

OFFICE OF THE CLERK
United States District Court
Eastern District of California
650 Capitol Mall, Room 2546
Sacramento, CA 95814
(916) 498-5415

Re: CASE NUMBER: CIV-S-95 2134 EJG GGH
(Zisk v City of Roseville, et al.)

SUBJET: Defendants April 22, 1996 served and filed Default Reply Co Plaintiffs Opposition

Dear Clerk:

Please be informed that I/We are in receipt of Defendants Reply to our Opposition served and filed on April 15. 1996. Pursuant to the rules, I/We have no due process opportunity for a response. Accordingly, this letter will serve to inform you that regardless, the defendants are in default and have no authority before the court, for any court assisted relief at this time. Please note that I/We hereby object, with an accompanying Proof of Service, to the subject Defendants attempt to have the court grant them any relief.

The defendants, April 22, 1996 served and filed Reply, is also in default to Plaintiffs April 15, 1996, served and filed Opposition to the City of Roseville Defendants moving papers served and filed on March 18, 1996. The Defendants scheduled hearing for April 29, 1996 must be vacated, by the warranted entry of default. The Defendants have no standing to force Plaintiffs to appear against the Defendants. Plaintiffs object to the Defendants scheduled hearing going forward.

Also, I/We are informed the Honorable William B. Shubb has been assigned to this Case, pursuant to the a purported standing order that the

Honorable Edward J. Garcia recuse with thc law fim1 involved. Also, I/We are informed that the Honorable William B Shubb has a daughter in the law firm involved. I/We are besides ourselves, that the law firm of Porter, Scott, Weiberg & Delehant chose to represent the defendants and then to be allowed to get a Judge of this Honorable Eastern District Court in place to make any ruling ultimately benefiting, his daughter's relationship and therefore enhance her standing in the law firm. I/We respectfully object to the Honorable William B. Shubb because of the potential for the appearance of bias and obligations that grow out of the strong bond of the father/daughter relationship at issue.

Very Truly yours,

WILLIAM J. ZISK

LOIS E. ZISK

Court: United States District Court for the Eastern District Of California
Case Number CIV-S-95-2134 EJG / GGH
Case Name: Zisk v City of Roseville, California et al

DECLARATION OF PERSONAL SERVICES

I am a citizen of the United States and employed in the County of Placer. I am over the age of eighteen (18) years and party to the within above-entitled action, My business address is 205 Thomas Street, Roseville, California 95678.

On April 25, 1996, I served the following.
April 24, 1996 letter to the Office of the Clerk, Re: Default Reply

XXX (by personally delivering a true copy thereof, in accordance with California Code of Civil Procedure §1011, to the person(s) and the address(es) set forth below.

Terence J. Cassidy
Law Offices of Porter, Scott. Weiberg & Delehant
A Professional Corporation
3S) University Avenue, Suite 200
Post Office Box 255428
Sacramento, California 95865
(one copy)

Office of the Clerk
United States District Court
Eastern District of California
650 Capitol Mall, Room 2546
Sacramento, CA 95814
(original ant one copy)

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 25, 1996 at Roseville, California.

_____
William J. Zisk

WILLIAM J. ZISK
LOIS E. ZISK
205 Thomas Street
Roseville, CA. 95678
Telephone: (916) 782-2233
Telecopier: (916) 783-3408

Plaintiffs in Pro Per

ORIGINAL
FILED
JAN 21 1997
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM J. ZISK and LOIS E. ZISK,
Plaintiffs

vs .

CITY OF ROSEVILLE, CALIFORNIA, et al
Defendants

NO.CIV-S-95 2134 CEB GGH
MEMORANDUM OF POINTS AUTHORITIES IN SUPPORT OF PLAINTIFFS APPLICATION FOR DEFAULT JUDGMENT BY COURT
F.R.C.P. Rule 55(a)(b)(2)
DATE: February 18, 1997
TIME: 9:00 a.m.
CTRM: 6

Plaintiffs William J. Zisk and Lois E. Zisk hereby submit the following points and authority in support of Application for Default Judgment by Court.

I
INTRODUCTION

The record in this matter is evidence that Defendants entered the action well after the TWENTY days set forth in the served Summons. The Summons expressly states that unless timely response is made, Judgment by Default will be taken for the relief demanded in the complaint. Defendants have not been relieved of being in Default and still are in

Default. The record in this matter is evidence that Plaintiffs did not respond to the merits of any Defendant paper. Plaintiffs have consistently objected to the lack of standing of the Defendants to litigate their papers. Accordingly, Plaintiffs object to the assertion of the courts authority over plaintiffs' person. Plaintiffs hereby submit Application for Default Judgment by Court.

II
STATEMENT OF FACTS

The complaint in this action was timely filed on November 24, 1995 and amended on February 2, 1996. Service of Summons was completed on February 6, 7, 8, 1996, pursuant to F.R.C.P. Rule 4(e)(1). Absolutely no Defendant written response whatsoever was received by Plaintiffs or the Clerk of the Court during the 20 days that followed the Service of Summons (see Exhibit A attached hereto). The record is devoid of any written request to Plaintiffs or the Court during the 20 days following Service of summons, requesting an extension of time to answer, pursuant to L.R.142 of the District Court, Eastern District of California.

The face of the summons clearly states the following: "YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon Plaintiffs William J. Zisk and Lois E. Zisk an answer to the complaint which is herewith served upon you, within TWENTY days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment

by default will be taken against you for the relief demanded in the complaint." (emphasis added)

Indisputedly, Defendants have not been relieved of being in default and they are still in default. Procedurally, Plaintiffs are fully justified to a warranted due process Default Judgment by Court.

The record in this matter is evidence that Plaintiffs did not respond to the merits of any Defendant paper. Plaintiffs consistently have objected to the lack of standing of the Defendants to litigate their papers, and continue to object to the standing of Defendants, being in default.

III
ARGUMENT

Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer within 20 days after being served with the summons and complaint. Federal Rules of Civil Procedure Rule 12(a) (1) (A). Defendants are in default and lack standing to force Plaintiffs to respond on the merits, for to do so would constitute a waiver to a warranted procedural Default Judgment. Plaintiffs have objected to the lack of standing of the Defendants from the outset of this proceeding and continue to object to the standing of Defendants, being in default. Defendants have not been relieved of default and are still in default.

Courts conduct prudential standing analysis only after Article III standing has been established. U.S.C.A. Const. Art. 3, § 1 et seq.

Article III § 2 of the United States Constitution confines the Federal Courts to adjudicating actual "cases" and "controversies," In interpreting that restriction, Federal Courts have developed, among others, the doctrine of standing. See Allen v. Wright 468 U.S. 737, 750, 104 S. Ct. 3351, 3324, 82 L.Ed. 2d 556 (1984).

Standing does not focus on the merits but is preliminary jurisdictional requirement necessary to establish that a litigant is entitled to judicial action. The standing inquiry focuses on "whether the litigant is entitled to have the Court decide the merits of the dispute of particular issues." Warth v. Seldin, 422 Y,S. 490, 498, 95 S. Ct. 2197, 2205, 4S L.Ed. 2d 343 (1975).

When standing is challenged on the basis of pleadings, the Court accepts as true all material allegations of the complaint and construes the complaint in favor of the complaining party. Pennell v, City of San Jose, 485 U.S. 1, 7, 108 S. Ct. 849, 855, 99 L.Ed. 2d 1 (1988).

The face of the summons is very clear in stating: "YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon Plaintiffs William J. Zisk and Lois E. Zisk an answer to the complaint which is herewith served upon you, within TWENTY days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint." (emphasis added) see Cass County Music Company, et al, vs. Daniel J, Kobasic 635 F Supp 7, (1984).

Plaintiffs, as citizens and residents of the United States,

are entitled to due process and equal protection and application of the law as guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

IV
CONCLUSION

Based on the foregoing, Plaintiffs William J. Zisk and Lois E. Zisk respectfully request an Order of this Honorable Court that Defendants' City of Roseville, California; Harry Crabb, Jr. Pauline Roccucci; Mel Hamel; William Santucci; John M. Byouk; Richard Roccucci; Thomas Chambliss; Martha Riley; George A Bultan; June Wanish; Michael F. Dean; Steven Bruckman; G. Richard Brown and Frederick L. Barnett are in default for failure to timely plead or otherwise defend in said action as directed in the Summons and as provided in the Federal Rules of Civil Procedure, and that Plaintiffs' herewith Application for Default Judgment by Court be Granted.

Dated: January 20, 1997 Respectfully Submitted,

_____ _____

Lois E. Zisk William J. Zisk

5

Court: United States District Court for the Eastern District of California
Case Number: CIV-S-95 2134 GEB/GGH
Case Name: Zisk v. City of Roseville, California et al

DECLARATION OF PERSONAL SERVICE

I am a citizen of the United States and employed in the County of Placer. I am over the age of eighteen (18) years and party to the within above-entitled action. My business address is 205 Thomas Street, Roseville, California 95678. On January 21, 1997, I served the following:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS APPLICATION FOR DEFAULT JUDGMENT BY COURT

F.R.C.P. Rule 55(a)(b)(2)

XXX by personally delivering a true copy thereof, in accordance with California Code of Civil Procedure §1011, to the person(s) and the address(es) set forth below.

Terence J. Cassidy
Law Offices of Porter, Scottt Weiberg & Delehant
A Professional Corporation
350 University Avenue, Suite 200
Post Office Box 225428
Sacramento, California 95865
(one copy)

Office of the Clerk
United States District Court
Eastern District of California
650 Capitol Mall, Room 2546
Sacramento, CA 95814
(Original and one copy)

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 21, 1997 at Roseville, California.

_____
William J. Zisk

WILLIAM J. ZISK
LOIS E. ZISK
205 Thomas Street
Roseville, CA. 95678
Telephone: (91 6) 782-2233
Telecopier: (916) 783-3408

ORIGINAL
FILED
JAN 21 1997
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____
DEPUTY CLERK

Plaintiffs in Pro Per

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM J. ZISK and LOIS E. ZISK,
Plaintiffs

vs.
CITY OF ROSEVILLE, CALIFORNIA et al
Defendants

_____/

NO.CIV-S-95 2134 GEB GGH
DECLARATION OF WILLIAM J. ZISK AND LOIS B, ZISK IN SUPPORT OF APPLICATION FOR DEFAULT JUDGMENT BY COURT

DATE: FEBRUARY 18, 1997
TIME: 9:00 a.m.
CTRM 6

I WILLIAM J. ZISK AND I, LOIS E. ZISK, DECLARE:

1. I/We are the Plaintiffs' in this action.

2. The complaint in this action was timely filed on November 24, 1995 and amended on February 2, 1996.

3. Service of Summons on Defendants was completed on February 6, 7, 8, 1996, pursuant to F.R.C.P, Rule 4(e)(1).

4. Absolutely no Defendant written response whatsoever was received by Plaintiffs or the Clerk of the Court during the 20 days that followed the Service of Summons.

5. The record is devoid of any written request to Plaintiffs or the Court during the 20 days following Service of Summons, requesting an extension of time to answer, pursuant to

L.R.142 of the District Court, Eastern District of California.

6. I absolutely did not grant an extension of time to answer the service of summons, either oral or written, to any of the defendants in this action.

7. The face of the summons clearly states the following: "YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon Plaintiffs William J. Zisk and Lois E. Zisk an answer to the complaint which is herewith served upon you, within TWENTY days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint."(emphasis added}

8. Indisputedly, Defendants have not been relieved of being in default and they are still in default. Procedurally, Plaintiffs are fully justified to a warranted due process judgment by default.

9. The record in this matter is evidence that plaintiffs did not respond to the merits of any defendant paper. Plaintiffs consistently have objected to the lack of standing of the Defendants to litigate their papers, and continue to object to the standing of defendants, being in default.

10. Defendant[s] City of Roseville, California; Harry Crabb, Jr.; Pauline Roccucci; Thomas Chambliss; Martha Riley; George Buljan; June Wanish; Michael F. Dean; Steven Bruckman; G. Richard Brown; Frederick L. Barnett are not an infant or incompetent person or in military service or otherwise exempted under the Soldiers' and Sailors' Civil Relief Act of 1940; and

11. Said defendant[s] have not timely appeared in this

action. Notice of this application has been served as required by Rule 55(a)(b)(2).

12. Plaintiff is entitled to judgment against said defendant[s] on account of the claims pleaded in the complaint filed on November 24, 1995 and amended on February 2, 1996, to wit: Inverse Condemnation; Conspiracy to Violate and Violation of Civil Rights; Fraud; Rescission.

13. The amount of 1udgment sought is the relief demanded in the complaint.

The matters stated herein based on personal knowledge and information are true and correct. Those matters stated under belief, I believe them to be true and correct. If called to testify as a witness in this matter I can competently testify as to matters of fact.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this January 20, 1997 at Roseville, California 95678.

Lois E. Zisk

William J. Zisk

3

Court: United States District Court for the Eastern District of California
Case Number: CIV S-95-2134 GEB/GGH
Case Name: Zisk v. City of Roseville, California et al

DECLARATION OF PERSONAL SERVICE

I am a citizen of the United States and employed in the County of Placer, I am over the age of eighteen (18) years and party to the within above-entitled action. My business address is 205 Thomas Street, Roseville, California 95678.

On January 21, 1997, I served the following:

DECLARATION OF WILLIAM J. ZISK AND LOIS E. ZISK IN SUPPORT OF APPLICATION FOR DEFAULT JUDGMENT BY COURT

F.R.C.P. Rule 55(a} (b) (2)

XXX by personally delivering a true copy thereof, in accordance with California Code of Civil Procedure §1011, to the person(s) and the address(es) set forth below.

Terence J, Cassidy
Law Offices of Porter, Scott, Weiberg & Delehant
A Professional Corporation
350 University Avenue, Suite 200
Post Office Box 255428
Sacramento, California 95865
(one copy)

Office of the Clerk
United States District Court
Eastern District of California
650 Capitol Mall, Room 2546
Sacramento, CA 9S814
(Original and one copy)

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 21, 1997 at Roseville, California.

William J. Zisk

WILLIAM J. ZISK
LOIS E. ZISK
205 Thomas Street
Roseville, CA 95678
Telephone: (916) 782-2233
Telecopier: (916) 783-3408

ORIGINAL
FILED
DEC 15 1997
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____
DEPUTY CLERK

Plaintiffs in Pro Per

IN THE UNITFD STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM J. ZISK and LOIS E. ZISK,
Plaintiffs

NO. CIV-S-95 2134 GEB / GGH
AMENDED NOTICE OF APPEAL
F.R.A.P., Rule 4 (a), (4)

vs.

CITY OF ROSEVILLE,
CALIFORNIA, et al,
Defendants

_____/

TO THE CLERK OF THE ABOVE ENTITLED COURT:

Pursuant to the provision of Federal Rules of Civil Procedure, Rules 54, 58, and 79 (a), plaintiffs *in propria persona*, hereby submit the following AMENDED NOTICE OF APEAL from the purported Judgement in A Civil Case, filed on July 11, 1997. Plaintiffs do not waive the requirements of the separate document requirement specified in rule 58, for purposes of a final appealable Judgment, *see Bankers Trust Co. v Mallis* 435 U.S. 381, 98 S.Ct. 1117, 55 Led 2d 357 (1978).

On October 9, 1997, plaintiffs served and filed a separate Notice of Motion and Motion on this issue, being summarily denied without any reasoning by filed Order on December 10, 1997, and simultaneously prohibiting any clarification, modification, amendment and prohibiting plaintiffs from filing any further motions on this subject. Plaintiffs' hereby incorporate by reference plaintiffs' said summary denied Notice and Motion herein.

WHEREBY, AMEMDED NOTICE IS HEREBY GIVEN that, William J. Zisk and

Lois E. Zisk, plaintiffs in the above named case, hereby jointly appeal to the United States Court of Appeals for the Ninth Circuit from the purported Judgment filed herein on July 11, 1997, including but not limited to all orders of the court of any kind or nature issued in this action since it's commencement though and including the September 11, 1997 filed Order denying plaintiffs' Noticed Motion for New trial filed July 21, 1997, and through and including the December 10, 1997 filed order hand dated purportedly December 5, 1997, and filed December 10, 1997 summarily denying plaintiffs' Noticed Motions pertaining to factual lack of jurisdiction[s] and further prohibiting plaintiffs' from any further relief in the interests of justice.

Dated: December 13, 1997

Lois E. Zisk

William J. Zisk

CASE Zisk v. City of Roseville, California, et al
CASE NUMBER: 97- 17048, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

DECLARATION OF SERVICE BY MAIL

I am a citizen of the United States and employed in the County of Placer, I am over the age of eighteen (18) years and party to the within above-entitled action. My Business address is 205 Thomas Street, Roseville, California 95678.

On December 15, 1997 I served a true and correct copy of the following:

AMENDED NOTICE OP APPEAL

by placing said copy in a sealed envelope with postage thereon fully prepaid and deposited in the U.S. Mail at Roseville, CA 95678, addressed as follows:

Terence J. Cassidy
Law Offices of Porter, Scott/ Weiberg & Delehant
A Professional Corporation
350 University Avenue Suite 200
Post office Box 255428
Sacramento, California 95865

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 15, 1997 at Roseville, California 95678.

_____
William J. Zisk